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April 5, 2010

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**BY HAND DELIVERY**

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20024

ENTERED  
Office of Proceedings

APR - 6 2010

Part of  
Public Record

Re: Finance Docket No. 35360: *San Francisco Bay Railroad-Mare Island - Petition for Declaratory Order - Lennar Mare Island LLC, and Pursuant to 49 U.S.C. §11123 and 49 U.S.C. §1146.1(b)(1)(i) for Expedited Relief due to Unauthorized Cessation of Operations*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket are an original and ten copies of the Reply of Lennar Mare Island LLC in Opposition to Petition for Declaratory Order Pursuant, together with three disks containing electronic copies.

In accordance with 49 C.F.R. part 1104.2(d), please note that the original of this filing contains colored photographs and colored charts appended as exhibits.

Please date stamp the extra copy of this filing and return it with our waiting messenger.

Respectfully,



Karen E. Escalante

Enclosures

cc (with enclosures): John F. McHugh, Esq.  
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dc-598624

**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35360**

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**SAN FRANCISCO BAY RAILROAD-MARE ISLAND -  
PETITION FOR DECLARATORY ORDER - LENNAR  
MARE ISLAND LLC, AND PURSUANT TO 49 U.S.C. § 11123  
AND 49 C.F.R. § 1146.1 FOR EXPEDITED RELIEF  
DUE TO UNAUTHORIZED CESSATION OF OPERATIONS**

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**REPLY OF LENNAR MARE ISLAND, LLC  
IN OPPOSITION TO  
PETITION FOR DECLARATORY ORDER**

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**CONTAINS COLOR IMAGES**

**April 5, 2010**

## **TABLE OF CONTENTS**

SUMMARY OF ARGUMENT .....	4
BACKGROUND .....	7
ARGUMENT .....	10
I. THE BOARD SHOULD NOT COMMENCE A DECLARATORY ORDER PROCEEDING .....	10
A. There Is No "Uncertainty" Concerning the Central Issue Underlying SFBRR's Request .....	10
B. SFBRR Lacks Standing to Seek an Order Generally Addressing the Regulatory Status of LMI-Owned Trackage on Mare Island .....	13
II. THE BOARD CANNOT ISSUE THE DECLARATORY ORDER SOUGHT BY SFBRR BECAUSE THERE IS NO EXTANT COMMON CARRIER OBLIGATION ASSOCIATED WITH THE MARE ISLAND TRACKAGE .....	17
A. Because California Northern's Operations on Mare Island Trackage Were Exempt as "Spur," "Industrial" or "Switching" Operations, any Conceivable Common Carrier Obligation Was Extinguished When California Northern Ceased Operating on Mare Island .....	19
1. On Excepted Track, Any Common Carrier Obligation Is Extinguished When Operations Cease .....	19
2. The Mare Island Trackage Is Excepted Track .....	25
B. California Northern's Operations on Mare Island Could Not Have Given Rise to any Common Carrier Obligation Because It Was Well Understood that those Operations Were Temporary and Contingent .....	35

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**REPLY OF LENNAR MARE ISLAND, LLC  
IN OPPOSITION TO  
PETITION FOR DECLARATORY ORDER**

Lennar Mare Island, LLC (“LMI”) submits this reply to San Francisco Bay Railroad-Mare Island’s (“SFBRR’s”) Petition for declaratory order.<sup>1</sup> There is no merit to SFBRR’s request, and the Board should either decline to initiate a proceeding or decline to issue the declaratory order that SFBRR seeks.<sup>2</sup>

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<sup>1</sup> SFBRR’s Petition also sought an emergency service order pursuant to 49 U.S.C. § 11123. LMI previously replied to that portion of SFBRR’s Petition. *See Reply of Lennar Mare Island LLC in Opposition to Petition for Emergency Service Order Pursuant to 49 U.S.C. § 11123 (“LMI ESO Reply”)*, STB Finance Docket No. 35360 (filed Mar. 22, 2010). We demonstrate further herein that any such relief – emergency or otherwise – would be wholly unjustified.

<sup>2</sup> LMI’s Reply is supported by the Verified Statement of Thomas Sheaff, who has previously testified in this proceeding (attached as Exhibit 1 hereto; to avoid confusion we refer to his new statement as “Sheaff Apr. 5 V.S.”) and the Verified Statement of George Young (“Young V.S.”), a former Navy employee familiar with the Navy’s rail operations on Mare Island and the operations California Northern commenced in the late 1990s (the Young V.S. is attached as Exhibit 2 hereto). LMI’s Reply is also supported by

(footnote continued on next page ...)



## SUMMARY OF ARGUMENT

SFBRR's declaratory order request seeks to misuse the Board's authority. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has discretion to commence a proceeding and issue a declaratory order when appropriate to "terminate a controversy or remove uncertainty." Here there is no real controversy or uncertainty. Quite simply, SFBRR is seeking to create rights from whole cloth that it does not have in order to force itself on an unwilling landowner in the midst of one of California's largest pending redevelopment projects. The Board should reject SFBRR's demands.

The future of rail service on Mare Island does not depend on SFBRR. To the contrary, LMI continues to desire that rail service be available as an option for businesses on Mare Island. As the redevelopment of the Mare Island Shipyard proceeds, there may come a point when it makes sense – from the perspective of all stakeholders in the Island's redevelopment – for rail service to be carried out by a common carrier under the jurisdiction of the Board. But for now, and for the foreseeable future, any rail service must accommodate the ongoing redevelopment of the Island from a Naval Shipyard into a new, mixed-use community. In this setting, SFBRR is an interloper on Mare Island, and its parochial commercial interests – and desire to draw upon the sweeping powers of preemption afforded by Congress to common carrier railroads – must not be allowed to dictate the future course and progress of redevelopment. *See generally* Sheaff Apr. 5 V.S., ¶¶ 3, 76-77.

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the evidence and argument submitted with LMI's March 22 Reply in Opposition to SFBRR's Petition for an Emergency Service Order (referred to as "LMI ESO Reply") and LMI's Petition to Revoke Exemption filed in Finance Docket No. 35304 on March 19 (a copy of which we append to this record as Exhibit 3 hereto).

Although SFBRR describes the declaratory order it seeks in a variety of ways, its sole focus is on *SFBRR's own rights* to operate over LMI-owned trackage on Mare Island. SFBRR asks the Board to issue a "Declaratory Order establishing that [SFBRR], as common carrier, has the right to provide service on the track and, absent an agreement between LMI and [SFBRR], the Board will set the terms of that use." (SFBRR Pet., p. 30.) Alternatively, SFBRR seeks a "Declaratory Order that *it is required to provide* all service on this line which has been provided by [California Northern] and its predecessors, and that it has the right to utilize all infrastructure required to do so, including that owned by non-carrier LMI on terms to be set by the Board." (SFBRR Pet., p. 1 (emphasis added).)<sup>3</sup>

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<sup>3</sup> At one point, SFBRR requests a declaration that "the Board may impose terms on LMI allowing [SFBRR] to operate common carrier rail service," citing 49 U.S.C. § 11102. That provision gives the Board "authority to authorize a rail carrier to operate over the rail lines of a different carrier in 'terminal facilities,' including main line tracks for a reasonable distance outside of a terminal." *PYCO Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co.*, STB Finance Docket No. 34889 (served Nov. 21, 2006). LMI does not believe that SFBRR is seeking an order applying Section 11102. Indeed, LMI's ESO Reply expressly noted (at p. 5 n.3) that LMI understood SFBRR's Petition not to seek such relief, and SFBRR's rebuttal filed on March 25, styled a "Request for Leave to File a Reply" (which we refer to herein as "SFBRR Rebuttal") did not dispute this view.

In any event, SFBRR has made no effort to establish that Section 11102 could even apply here. Mare Island contains no facilities of any kind "owned by a rail carrier," as Section 11102 requires, nor are any of the track or other facilities on Mare Island encompassed in a "recognized terminal area" and "cohesive commercial area," as the Board's precedents require. *See, e.g., Rio Grande Industries, Inc. – Purchase & Related Trackage Rights – See Line Railroad Co. Line between Kansas City, MO & Chicago, IL*, ICC Finance Docket No. 31505 (ICC served Nov. 15, 1989), p. 11.

Moreover, SFBRR also would not be entitled to any declaration regarding the Board's authority under Section 11102 for the same reasons addressed herein and in LMI's opposition to SFBRR's request for relief under Section 11123. Were SFBRR to assert a right to formal service relief under Section 11102, LMI would be prepared to

(footnote continued on next page ...)

Unfortunately for SFBRR, there is no “uncertainty” whatsoever about the central point of the order SFBRR desires: it is crystal clear that, whatever the regulatory status of the LMI-owned track on Mare Island, SFBRR has no “right” or “obligation” to provide service on that track, as a common carrier or otherwise. No amount of debate would alter this fact, and as a result there is no occasion to commence a proceeding.

Second, and related to the first point, because SFBRR has no rights relating to the Mare Island trackage, it does not have standing to seek relief from the Board in this matter, and the Board should therefore decline to commence a proceeding at SFBRR’s behest. The Board should not intervene solely to provide a putative carrier with a commercial opportunity. Although some businesses on Mare Island have a general desire – which LMI shares – for the option of shipping by rail, no potential rail customer supports the specific relief SFBRR seeks here, and no purpose would be served by the Board’s intervention at this time. LMI has made arrangements for private switching service (by Mare Island Rail Service or “MIRS”) that would be compatible with the ongoing redevelopment of Mare Island, and no shipper has expressed dissatisfaction with such an arrangement. The only reason MIRS has not switched any railcars is that SFBRR has not been willing to deliver them to the west end of the Causeway on Mare Island. See LMI ESO Reply, p. 17.

Third, if the Board nonetheless were to commence a proceeding to address the merits of SFBRR’s request, it could not escape the conclusion that there is no extant common carrier obligation with respect to the trackage on Mare Island. Neither the U.S.

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offer further evidence addressing the statutory criteria in the context of a request for longer-term relief than that sought under Section 11123.

Navy's historical operations, nor the switching operations conducted on the trackage by California Northern between the mid-1990s and early 2008, give the Board jurisdiction over that trackage today. During the period of California Northern's operation, all of the trackage on Mare Island was ancillary "spur, industrial [or] switching" track under 49 U.S.C. § 10906. As a result, when California Northern withdrew from the Island in 2008, that trackage was "properly taken out of service without any need for regulatory permission" and any "common carrier obligation" would have been extinguished. See *Jefferson Terminal R.R. – Acquisition & Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33950 (served Mar. 19, 2001).

In addition, California Northern's switching service on Mare Island could not have given rise to any common carrier obligation of the sort that SFBRR claims. LMI limited California Northern's operations as needed to make them compatible with ongoing development, and it was always understood by all of the stakeholders in the redevelopment of Mare Island – California Northern, the City of Vallejo, and all businesses on Mare Island – that rail service was subject to interruption or termination based on numerous contingencies relating to the ongoing redevelopment of the Island, and that the future of rail service on the Island, or at any given point thereon, was entirely speculative.

The declaratory order SFBRR requests would inappropriately sweep away those limitations and contingencies, holding the ongoing redevelopment of Mare Island hostage to SFBRR's own parochial desire to operate a railroad on the Island. The Board should not allow its processes to be misused in this way.

## **BACKGROUND**

This dispute concerns SFBRR's effort to force its way onto railroad trackage owned by LMI and located on Mare Island in Vallejo, California, the site of a former U.S. Navy Shipyard that is now in the midst of one of California's largest pending redevelopment projects. The facts underlying this dispute are covered in detail in LMI's previous Reply in Opposition to SFBRR's Petition for an Emergency Service Order, filed on March 22 in this docket, as well as in LMI's Petition to Revoke the exemption SFBRR obtained with respect to the trackage on Mare Island in Finance Docket No. 35304, which LMI filed on March 19.

To summarize the salient historical facts, Mare Island was a U.S. Navy Shipyard until the mid-1990s, when the base was closed. While the Shipyard was active, the U.S. Navy owned and operated a railroad to serve the Shipyard, which connected Mare Island with the Vallejo Branch of the Southern Pacific (later leased by California Northern) at a point in Vallejo known as Flosden Acres. In the mid-1990s, the Navy gave California Northern a short-term license allowing it to use Shipyard trackage to reach a building where California Northern could service its locomotives, and later to switch railcars on certain Shipyard trackage in the vicinity of that location. *Young V.S.*, ¶ 4; *see also* LMI ESO Reply, *Sheaff V.S.*, ¶¶ 12-16 & Exh. A. Those Navy licenses expired in 1998, but California Northern continued to provide switching service on Mare Island until 2008, when California Northern's operations ceased permanently. Meanwhile, in 2002 a large portion of the Shipyard had been conveyed to LMI so that LMI could systematically transform it from an industrial military installation into a vibrant mixed use community in coordination with the City of Vallejo and numerous other stakeholders and government

agencies. That transformation process is still underway. *See* LMI ESO Reply, Sheaff V.S., ¶¶ 34-36; Sheaff Apr. 5 V.S., ¶¶ 57-62, 76-77.

SFBRR inserted itself into the middle of the redevelopment project in late 2009. When SFBRR first appeared on the scene, LMI was initially optimistic that SFBRR's interest in Mare Island might provide LMI with an opportunity to restore rail service, and LMI explored with SFBRR whether it was prepared to provide such service in a manner that was sensitive to and consistent with the needs of the ongoing redevelopment effort. *See* Sheaff Apr. 5 V.S., ¶ 74. SFBRR then filed its notice of exemption seeking authority to operate both the City-owned trackage between Flosden Acres and Mare Island, as well as the LMI-owned trackage on Mare Island, without notice to LMI and while discussions with LMI were ongoing (and, in the process making misrepresentations about the track's ownership and the need for an agreement with LMI). Despite this, LMI continued to explore whether there was some way that LMI's needs could be accommodated. These further discussions confirmed, however, that SFBRR had no interest in accommodating the ongoing redevelopment efforts. *Id.* Instead, SFBRR sought to exploit the full measure of regulatory power (and preemption) afforded by the "common carrier obligation" it asserted for its operations on Mare Island. Sheaff Apr. 5 V.S., ¶¶ 74-77; *see also* LMI ESO Reply, Sheaff V.S., ¶¶ 24-25.

When negotiations with LMI failed to provide SFBRR with the right to operate on Mare Island that it sought, SFBRR filed its Petition with the Board demanding an emergency service order giving it access to any and all LMI trackage it wished, and also seeking a declaratory order that it is entitled to operate on LMI-owned trackage. LMI responded by petitioning to revoke SFBRR's exemption as to the Mare Island trackage,

which was procured with misleading representations about the ownership of trackage on Mare Island and SFBRR's need to obtain rights from LMI in order to operate on the Island. Then, on March 22, LMI filed its Reply to SFBRR's emergency service order request, explaining that there was no merit to SFBRR's access demands because, *inter alia*, there was no service emergency and SFBRR's proposed intrusion into Mare Island would cause serious damage to the ongoing efforts by LMI, the City, and numerous other stakeholders to complete the redevelopment of the Mare Island Shipyard. The City of Vallejo joined LMI in opposing SFBRR's request. *See Reply of City of Vallejo in Opposition to Request for Expedited Relief*, Finance Docket No. 35360 (filed Mar. 22, 2010) ("City of Vallejo Reply").

This Reply now addresses the further reasons why SFBRR is not entitled to any declaration that it has rights to operate on Mare Island trackage.

## **ARGUMENT**

### **I. THE BOARD SHOULD NOT COMMENCE A DECLARATORY ORDER PROCEEDING**

Under the governing statutory provisions – 5 U.S.C. § 554(e) and 49 U.S.C. § 721 – the Board may issue a declaratory order to terminate a controversy or remove uncertainty. It also has broad discretion to determine whether commencing a proceeding would be appropriate, and has often declined even to commence a proceeding. The Board should decline to commence a proceeding in this case.

#### **A. There Is No "Uncertainty" Concerning the Central Issue Underlying SFBRR's Request**

The only relief that SFBRR requests is plainly beyond its reach. It asks for an order aimed at benefitting its own self-serving commercial interests, to the effect that

SFBRR has the right and obligation to operate on LMI-owned trackage. However, it is crystal clear that SFBRR has no such rights or obligations. Instead of seeking to resolve conflict or uncertainty, SFBRR desires to have the Board create *new* rights where none exist today. The ancillary issues SFBRR raises about the “common carrier” status of past operations on the Island, while perhaps of some academic interest, would not give SFBRR the relief it seeks, and so do not warrant instituting a proceeding. Accordingly, the Board should reject SFBRR’s Petition at the outset, without entertaining further debate about these issues.<sup>4</sup>

The sole focus of SFBRR’s requested declaratory order is on *SFBRR’s own rights* to operate over LMI-owned trackage on Mare Island. SFBRR asks the Board to issue a “Declaratory Order establishing that [SFBRR], as common carrier, has the right to provide service on the track and, absent an agreement between LMI and [SFBRR], the Board will set the terms of that use.” (SFBRR Pet., p. 30.) Alternatively, SFBRR seeks a “Declaratory Order that *it is required to provide* all service on this line which has been provided by the CFNR and its predecessors, and that *it has the right to utilize all infrastructure required to do so*, including that owned by non-carrier LMI on terms to be set by the Board.” (*Id.*, p. 1 (emphasis added)).

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<sup>4</sup> See, e.g., *Chelsea Property Owners – Petition for Declaratory Order – Highline*, Finance Docket No. 34259 (served Nov. 27, 2002) (finding no reason to institute a declaratory order proceeding to resolve issues that may never arise where City had not yet finalized its plans regarding the rail line at issue); *James Riffin – Petition for Declaratory Order*, Finance Docket No. 34997 (served May 2, 2008) (denying request to institute a declaratory order proceeding where the parties had presented enough information to allow the Board to decide that the law on the scope of federal preemption was clear as it applied to the activities at issue); *Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. – Petition for Declaratory Order*, Finance Docket No. 34824 (served Aug. 11, 2006) (declining to institute a declaratory order proceeding where the Board was able to conclude it did not have jurisdiction).



But there is no room for debate that SFBRR has no such rights or obligations. As LMI has already explained in both its Petition to Revoke and its ESO Reply:

- SFBRR does not have – and has never had – any property interest or contract rights relating to rail trackage on Mare Island (LMI Pet. to Revoke, pp. 8-9; LMI ESO Reply, p. 15 & Sheaff V.S., ¶¶ 21, 24).
- SFBRR has never operated on Mare Island trackage, except on the 300-yard spur used to serve Alstom (LMI ESO Reply, p. 15 & Sheaff V.S., ¶¶ 22-23);<sup>5</sup>
- SFBRR has no rights as “successor” to California Northern (LMI ESO Reply, pp. 10-14 & Franger V.S.); and
- SFBRR cannot claim any rights arising from its Notice of Exemption in Finance Docket No. 35304 (LMI ESO Reply, pp. 14-15).<sup>6</sup>

SFBRR cannot dispute any of these facts, and SFBRR’s Rebuttal did not even attempt to do so. SFBRR instead seeks to shift the focus to California Northern’s operations on Mare Island before 2008 (SFBRR Rebuttal, ¶ 3) and SFBRR’s own asserted status as a “common carrier” on the trackage owned by the City of Vallejo (which LMI does not necessarily concede, given that SFBRR has served only Alstom).<sup>7</sup>

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<sup>5</sup> As noted below, even as to the 300-yard spur over which SFBRR operates to serve Alstom, there is no common carrier service. See page 18 & note 11, below.

<sup>6</sup> The Board’s authority “is permissive, not mandatory” and it does not give SFBRR “a legal property interest in the line.” *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245 (served Sept. 15, 2009), p. 6 (citing *Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, STB Finance Docket No. 33905 (STB served Oct. 22, 2001); see also, e.g., *General Railway Corporation, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867 (STB served June 15, 2007).

<sup>7</sup> The City of Vallejo likewise does not regard SFBRR as providing common carrier service today. See City of Vallejo Reply.

Whatever significance those points might have for SFBRR's emergency service order request (and LMI submits they have none, as discussed further below), they have nothing whatsoever to do with SFBRR's own lack of rights or obligations relating to LMI-owned trackage on Mare Island.

As a result, the Board cannot under any circumstances declare that SFBRR has any "rights" with respect to that trackage or that it has taken on any common carrier obligations with respect to that trackage. *See, e.g., James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245 (served Sept. 15, 2009), p. 5. Accordingly, the Board should reject SFBRR's request to commence a declaratory order proceeding.

**B. SFBRR Lacks Standing to Seek an Order Generally Addressing the Regulatory Status of LMI-Owned Trackage on Mare Island**

As is plain from the declaration that SFBRR asks the Board to make, SFBRR *does not* ask for an abstract determination as to whether the LMI-owned trackage on Mare Island is within the Board's jurisdiction, or whether any of the rail operations that occurred in the past on Mare Island were those of a common carrier. SFBRR's request for a declaratory order is entirely focused on having the Board declare that *SFBRR itself* has the rights it asserts.

To the extent SFBRR's request might nonetheless be interpreted as one asking for a declaration as to the regulatory status of trackage on Mare Island *in general*, SFBRR lacks standing to make such a request. The Board has explained that "[t]he courts have devised a three-part test to determine whether a party has standing to bring an action: (1) the party must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant's challenged conduct; and (3) the injury must be one that is likely to be

redressed through a favorable decision.” *James Riffin d/b/a Northern Central R.R. – Acquisition & Operation Exemption – in York County, PA*, STB Finance Docket No. 34501 (served Feb. 23, 2005) (“*Riffin – York County*”), p. 5 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Under these principles, SFBRR does not have standing to seek an order addressing the regulatory status of Mare Island trackage. Because SFBRR has never had any rights relating to that trackage, it cannot claim to have suffered any injury as a result of being denied access to the trackage. To have standing, a complainant “must show some ‘invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.’” *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Courts have held squarely that a party claiming it was unlawfully denied access to lands – lacks standing when it fails to “demonstrate any tangible interest in the lands in question.” *Great Prince Michael v. United States*, 260 F. Supp. 2d 23, 26 (D.D.C. 2003). SFBRR’s utter lack of legal entitlement to be on LMI’s property similarly deprives it of standing to seek an abstract adjudication of the status of LMI-owned trackage.

Even if SFBRR might claim some metaphysical injury from such a denial of access, it still would not have standing, since the order it seeks would not overcome that theoretical harm. *See Riffin – York County*, p. 5 (“the injury must be one that is likely to be redressed through a favorable decision”). An order proclaiming that the Board has jurisdiction over the Mare Island trackage, or that potential rail customers on Mare Island are entitled to service by a common carrier, would still not give SFBRR access to any

Mare Island trackage. LMI would instead be free to arrange for service with a provider of its choice, as it has already done by contracting with Mare Island Rail Service. *See, e.g., Yolo Shortline R.R. – Lease & Operation Exemption – Port of Sacramento*, STB Finance Docket No. 34114 (served Feb. 3, 2003) (“We see no reason to prevent the Port from determining which carrier it wants to have operating over its track.”); *see also, e.g., Lackawanna County R.R. Authority – Acquisition Exemption – F&L Realty, Inc.*, Finance Docket No. 33905 (served Oct. 22, 2001), p. 6 (denying relief sought by one carrier that would have pre-judged question of which of two authorized carriers had the necessary property interest or contractual right under applicable agreements to exercise that authority).

As explained in LMI’s ESO Reply, LMI has already arranged for T&O Railroad Company, Inc. (“T&O”), doing business as Mare Island Rail Service (“MIRS”), to perform private switching services on Mare Island. T&O is an affiliate of Tri-City Railroad Company, LLC, an experienced switching carrier licensed by the Board with operations in the State of Washington. Although the operations contemplated by LMI’s agreement with MIRS would be private, contract-carrier operations, MIRS would be prepared to obtain (and fully capable of obtaining) a license from the Board to conduct common carrier operations on this trackage if the Board determines that potential rail customers on Mare Island must be served by a Board-authorized common carrier. *See* LMI ESO Reply, Peterson V.S., ¶ 9.

In addition, and of equal importance, SFBRR 'seeks relief to further its own commercial interests, not in order to provide relief for shippers.<sup>8</sup>' The Supreme Court and the Board have both recognized that the Interstate Commerce Act was intended "for the protection of those who pay or bear the rates." *Texas & Pacific v. United States*, 289 U.S. 627, 638 (1933) ("*Texas & Pacific*"); *Horizon Lines, LLC – Petition for Declaratory Order*, Finance Docket No. 35039 (served Dec. 19, 2007) (citing *Texas & Pacific* and denying petition for declaratory order because there was no "credible allegation of harm to a shipper"); *Norfolk Southern Ry. Co. – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern R.R.*, Docket No. 42078 (served April 29, 2003), p. 7 (denying petition for declaratory order brought by one carrier against another because Board had not been asked by any shipper for relief).

LMI understands that several businesses on Mare Island have a general desire for a rail service option, and LMI is prepared to make that option available as it continues, and ultimately completes, its historic mixed-use redevelopment of Mare Island. However, all stakeholders in Mare Island's success – LMI, the City of Vallejo, and the businesses on Mare Island – also understand that any rail service must take place in a manner that does not conflict with the Island's further redevelopment, and for that reason none of these Mare Island stakeholders has supported SFBRR's specific demand that it be allowed to commence common carrier operations. Sheaff Apr. 5 V.S., ¶¶ 57-58: City

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<sup>8</sup> Only one business on Mare Island other than Alstom (XKT) has any specific traffic it would like to move by rail, but that business has made it clear that it has no particular preference in having SFBRR provide that service. See Exhibit 4. And, as Mr. Sheaff has previously explained, currently "there is no obstacle (other than SFBRR's unwillingness to deliver cars) to MIRS providing efficient service to all of the potential customers identified in SFBRR's Petition" *LMI ESO Reply*, Sheaff V.S., ¶ 30.

of Vallejo Reply, p. 6 ("City opposes any order of the Board which would require the City to allow [SFBRR] to trespass over its land absent a reasonable long-term agreement." ).<sup>9</sup> In these circumstances, LMI submits, the prudent course is to allow LMI's redevelopment of Mare Island to proceed without Board intervention, so that LMI can accommodate tenants' desire for rail service while redevelopment proceeds, and – when that redevelopment is complete – all interested parties can make a determination whether or not they desire rail service to be provided by a common carrier within the jurisdiction of the Board. Sheaff Apr. 5 V.S., ¶¶ 76-77. A declaratory order favoring SFBRR in such circumstances would not be a proper use of Board processes.

**II. THE BOARD CANNOT ISSUE THE DECLARATORY ORDER SOUGHT BY SFBRR BECAUSE THERE IS NO EXTANT COMMON CARRIER OBLIGATION ASSOCIATED WITH THE MARE ISLAND TRackage**

Were the Board to commence a proceeding to consider whether the rail trackage on Mare Island is within the Board's regulatory authority, and subject to an ongoing obligation on the part of some residual common carrier to provide rail service, LMI submits that the only conclusion possible on this record is that no common carrier obligation is attached to the trackage on Mare Island.<sup>10</sup>

First, as discussed above, no common carrier obligation could arise from the authority SFBRR was granted in Finance Docket No. 35304, since SFBRR has never

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<sup>9</sup> For example, XKT, the only potential rail customer that SFBRR has identified as making a specific demand for rail service, has made clear that it does not care who provides such service, and has not supported SFBRR's Petition. See "*Mare Island Eager for Railroad's Full Return*," Vallejo Times Herald, Apr. 3, 2010 (Exhibit 4 hereto) (quoting XKT General Manager as saying: "We don't care who's going to do it. ").

<sup>10</sup> Were the Board nonetheless to commence a proceeding, LMI would request the opportunity to conduct discovery of third parties to further develop the factual record concerning, *inter alia*, past rail operations on Mare Island.

*actually operated* on Mare Island, other than to serve Alstom,<sup>11</sup> and has no rights to carry out any such operations. See pages 12-13, above.

**Second**, the U.S. Navy's historic operations could not confer jurisdiction, since there is no room for doubt that those operations were purely private in character – to serve the Navy's own needs at the Mare Island Shipyard.<sup>12</sup> This is the quintessential private carrier operation. See, e.g., *Willis, C.P.A.*, p. 2 (“[A]s long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board’s jurisdiction.”).

**Third**, given the history of Mare Island as a Naval Shipyard, SFBRR relies entirely on the operations of California Northern between 1994 and 2008 to establish the existence of “common carrier freight service.” See SFBRR Rebuttal, ¶¶ 3-4. Yet California Northern’s past operations could not give the Board current jurisdiction over this trackage, for two reasons: (a) those switching operations were merely ancillary to California Northern’s Board-authorized operations in the vicinity and thus were properly

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<sup>11</sup> SFBRR’s service to Alstom is at most private or contract carrier service, as it is carried out pursuant to Alstom’s own rights in its lease with LMI allowing it to arrange rail service over the 300-yard spur between the Mare Island Causeway and Alstom’s building. See LMI ESO Reply, *Sheaff V.S.*, ¶ 22; see also *Sheaff Apr. 5 V.S.*, ¶ 27. Board precedent makes clear that such service on this trackage is not subject to the Board’s jurisdiction. See, e.g., *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013 (served Oct. 3, 2001) (“*Willis, C.P.A.*”), p. 2 (track owned by rail customer is private track even where common carrier operates over line to serve customer); *Hanson Natural Resources Co. – Non-Common Carrier Status – Petition for a Declaratory Order*, Finance Docket No. 32248 (served Dec. 5, 1994) (“*Hanson Natural Resources*”) (same).

<sup>12</sup> See *Young V.S.*, ¶ 3. As LMI explained in its ESO Reply, the U.S. Navy occupied the Mare Island Naval Shipyard for 150 years prior to its official closure in 1996. During this time, the Navy installed and operated several miles of railroad trackage that it used to carry out its own military functions. See LMI ESO Reply Ex. A (*Sheaff V.S.*) ¶¶ 10-11.

terminated without the need for Board authority, thereby extinguishing any common carrier obligation that might once have existed (although in this case no such obligation ever arose); and (b) California Northern's operations could not in any event have given rise to a common carrier obligation because California Northern could not have held itself out as available to provide such service in view of the ongoing redevelopment of Mare Island, which made operations inherently subject to cessation or interruption, and the future of such operations at any given point on the Island – or on the Island as a whole – entirely speculative.

**A. Because California Northern's Operations on Mare Island Trackage Were Exempt as "Spur," "Industrial" or "Switching" Operations, any Conceivable Common Carrier Obligation Was Extinguished When California Northern Ceased Operating on Mare Island**

It is easiest to see why there is no extant common carrier obligation associated with the rail trackage on Mare Island by assuming – contrary to fact, as we demonstrate below – that California Northern's past operations on the Island *were* those of a common carrier. Even if that were so, California Northern was free to terminate those operations without seeking Board permission, because the Mare Island trackage it was using was excepted "switching," "spur," "team" and/or "industrial" trackage. Accordingly, when California Northern's operations ceased in early 2008, any common carrier obligation terminated along with them. The Board's jurisprudence in this area is well developed, and readily applied to the available facts.

**1. On Excepted Track, Any Common Carrier Obligation Is Extinguished When Operations Cease**

There is no question that a carrier such as California Northern may discontinue service on non-jurisdictional track without the need for Board permission. That is both the plain meaning of 49 U.S.C. § 10906 as well as a long-established principle of the



Board's decisional law. As the Board has explained: "In cases governed by 49 U.S.C. 10906 (formerly 49 U.S.C. 10907 (1995)), we do not have authority under sections 10901 through 10905 and 10907 over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." *Union Pacific R.R. – Operation Exemption – in Yolo County, CA*, STB Finance Docket No. 34252 (served Dec. 5, 2002) ("*Union Pacific – Yolo*"). Thus, a carrier operating such trackage may "terminate[] its operations over this track without even notifying [the Board]." *Id.*, p.4 n.13. This is exactly what California Northern did in 2008, when it completely ceased its operations on Mare Island. See Sheaff Apr. 5 V.S., ¶ 71 & Exh. L.

SFBRR repeatedly invokes *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946), for the proposition that "operating rights and obligations or rights to use required lands do not expire with the termination of a land use agreement." SFBRR Rebuttal, ¶ 3; see also SFBRR Pet., p. 15. But this principle derives from the Board's plenary jurisdiction to authorize abandonments of rail lines, and thus is simply inapplicable when trackage is excepted by Section 10906. See *Union Pacific – Yolo*, p. 5 (Board jurisdiction cannot be invoked to prevent carrier's eviction from ancillary switching trackage).

It is equally uncontroversial that a cessation of rail service on excepted trackage extinguishes any possible common carrier obligation relating to that trackage. As the Board explained in *Jefferson Terminal R.R. – Acquisition & Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33950 (served Mar. 19, 2001), when such trackage is "properly taken out of service without any need for regulatory permission," any "common carrier obligation" is extinguished. *Id.*, pp. 4-5. This principle would apply even if California Northern had continued to make some use of the

Mare Island trackage. For example, in *Burlington Northern R.R. – Abandonment – in Grays Harbor County, WA*, Docket No. AB-6 (Sub-No. 207) (served July 25, 1997), the Board explained that a carrier can abandon a rail line pursuant to Board authority even when it continues to use the line to provide contract service to a shipper. In such circumstances, the carrier's "actions result[] in operations that are analogous to that of a common carrier providing service over a spur line not subject to ICC or Board jurisdiction," and the Board has no authority to require continued operation (by common carrier or otherwise) on the line. *Id.*, pp. 5-6; cf. *Limits Industrial Building Corp. v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 258 I.C.C. 438, 441 (1944) ("*Limits Industrial Building Corp.*") (not unlawful for carrier to decline to provide freight service on track needed to reach industry where track was a spur never dedicated to public use).

SFBRR also argues that trackage used to "provide common carrier freight service" constitutes a "line of railroad within the Board's jurisdiction even if temporarily idle." SFBRR Rebuttal. ¶ 4. This argument, however, misapplies the Board's precedents, for it presupposes that the trackage at issue is a "line of railroad" subject to the Board's jurisdiction under Section 10901. That was the situation in the one case that SFBRR cites, *City of Jersey City, et al. – Petition for Declaratory Order*, Finance Docket No. 34818 (served Aug. 9, 2007). In *City of Jersey City*, the Board's conclusion that the inactive trackage in question remained part of the national rail system turned entirely on its finding that Conrail had acquired that trackage as a "line of railroad." *Id.*, p. 8. That finding was not surprising given that Conrail's predecessor had used the trackage "as part of that carrier's main freight route between the Midwest and Harsimus Cove Yard." *Id.*, p. 2; see also *id.*, p. 10. The Board expressly noted that, had the trackage been "ancillary

spur and yard track,” it could have been “abandoned under 49 U.S.C. 10906 without regulatory approval.” *Id.*, p. 8.

Here, there is no question that California Northern terminated all service on Mare Island in March 2008. California Northern specifically informed LMI that its operations on Mare Island were those of a “switching carrier,” that California Northern had not “held itself out to be a common carrier for service on Mare Island,” and that its operations were “not common carrier operations.” Sheaff Apr. 5 V.S., ¶ 71 & Exh. L. As a result, California Northern advised LMI that it did not “require authority from the [Board] to terminate those operations,” and closed by saying that it would “cease operations in time for all cars on Mare Island to be removed by March 31, 2008.” *Id.*

SFBRR acknowledges that California Northern’s operations ceased entirely in 2008. SFBRR Rebuttal, ¶ 5; SFBRR Pet., p. 9. SFBRR appears to argue, however, that California Northern’s termination of service should not count because it was caused by LMI rather than “market or other business considerations.” SFBRR Rebuttal, ¶ 5. SFBRR’s contentions are both irrelevant and incorrect. Under the governing statute, the reasons why California Northern’s operations were discontinued is immaterial; if the Board lacked jurisdiction over them, there would have been no regulatory impediment to their cessation for any reason.

In fact, moreover, the truth is contrary to SFBRR’s assertions. As Mr. Sheaff explains (and as shown graphically on Mr. Sheaff’s Exhibit B), California Northern’s traffic volumes on Mare Island had declined significantly by early 2008, from a very modest “peak” of about five cars per day in 2004 and 2005 to fewer than two cars *per week* during the second half of 2006 and all of 2007. Sheaff Apr. 5 V.S., ¶ 15 & Exh. B.

The reason for these declines had nothing to do with LMI. During 2006, the two rail customers that had accounted for the vast majority of all shipments stopped receiving railcars at their Mare Island facilities. One – Wines Central – experienced a devastating fire and went out of business. *Id.*, ¶ 19. Another – North Pacific Lumber – relocated voluntarily from a facility that it leased on a short term basis to longer-term space in nearby Napa, California, where it continued shipping by rail until shutting down in the recent economic downturn. *Id.*, ¶ 18.

SFBRR incorrectly asserts that the per-car fees that LMI charged rail customers on Mare Island led to traffic reductions and the ultimate departure of California Northern. SFBRR Rebuttal, ¶ 5. That is exactly backwards: the fees increased because traffic volumes fell precipitously, not the other way around. As Mr. Sheaff explains, LMI imposed a modest charge on rail customers during the period of California Northern's operations because LMI did not have any agreement with California Northern, and specifically no arrangement providing for California Northern to maintain the trackage on Mare Island or compensate LMI for this work. Sheaff Apr. 5 V.S., ¶ 60. LMI calculated the amount of its charge based on its actual out-of-pocket costs for inspection and maintenance divided by the number of railcars delivered to Mare Island businesses. When traffic was at its peak in 2004, that charge amounted to only about \$25-35 per car. After traffic declined in 2006, the per-car charge necessarily increased, and reached as high as \$199 per car. *Id.*, ¶ 68. Even with a charge at this level, however, LMI was still subsidizing rail operations on the Island to a significant degree. *Id.*, ¶ 69.

LMI was nonetheless prepared to continue subsidizing the maintenance of rail trackage on Mare Island (and it remains to this day prepared to assist with the

establishment of rail service for businesses that desire it if that service can be carried out in a manner that does not intrude on redevelopment). LMI had spent years working with the City of Vallejo, California Northern and potential rail-served businesses on Mare Island to try to find a way to make a rail option work. However, as Mr. Sheaff explains, LMI faced much more onerous multi-million-dollar infrastructure-related costs associated with reconfiguring rail trackage in numerous street corridors on Mare Island, and significant safety upgrades being required by the California PUC. *See* Sheaff Apr. 5 V.S., ¶ 69 & Exh J. With the dramatically lower volumes of rail shipments – again, fewer than two cars per week – LMI reluctantly concluded that traffic levels did not justify the huge costs associated with integrating continued rail service with the Mare Island redevelopment plans (for which there was no alternate funding mechanism), and California Northern’s operations were terminated. *Id.*, ¶¶ 70-71 & Exh. K.

LMI offers these facts primarily to underscore that it did not set about to deprive rail customers of access to a rail shipping option. SFBRR was not on the scene in 2008, and its speculation about the facts is both inaccurate and without foundation.

But the salient facts bearing on the regulatory status of the trackage on Mare Island and the declaratory order SFBRR seeks are much simpler and beyond dispute: in early 2008 California Northern discontinued its operations completely; it did so voluntarily and without objection, and without California Northern seeking any permission from the Board; and no rail customer made any objection to the Board. *Sheaff* Apr. 5 V.S., ¶ 71 & Exh. L. In fact, as SFBRR acknowledges, no business on Mare Island demanded rail service until very recently. SFBRR Pet., p. 9 (“There is no record of any demand for service having been made to the [California Northern] until

mid-2009.”)<sup>13</sup> Under these circumstances, any common carrier obligation that SFBRR might hypothesize was extinguished when California Northern ceased operating on Mare Island, because, as we develop in the next section, Board approval was not needed for California Northern to discontinue those operations.

## **2. The Mare Island Trackage Is Excepted Track**

The Board’s precedents make clear that California Northern was under no obligation to seek regulatory authority to discontinue its operations on Mare Island, thereby extinguishing any hypothetical common carrier obligation.

As the Board has explained:

“Whether a track segment is excepted from our licensing authority by section 10906 or, alternatively, fully subject to the rail licensing provisions of the statute is determined by examining the intended use of the track. A line is subject to our regulation under section 10901 if the effect of the trackage is to extend the line of a carrier into new territory, if it is used for continuous transportation service by through trains between different points, or if the trackage constitutes the entirety of a carrier’s line. Conversely, if the line is used for loading, unloading, storage, switching, or other purposes incidental to transportation service, it is excepted trackage under section 10906.”

*Union Pacific – Yolo*, pp. 3-4. The Board considers the history and physical characteristics of the trackage in making this determination. *See, e.g., The New York City Economic Development Corp – Petition for Declaratory Order*, STB Finance Docket No. 34429 (served July 15, 2004) (“NYCEDC”), pp. 6-7; *ParkSierra Corp. (Successor-In-Interest to California Northern R.R. Limited Partnership) – Lease & Operation Exemption – Southern Pacific Transportation Co.*, Finance Docket No. 34127 (served

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<sup>13</sup> As noted, moreover, even now only one business on Mare Island other than Alstom (XKT) has any specific traffic it would like to move by rail, and that business has made clear that it has no particular interest in having cars switched by SFBRR rather than another service provider. *See* page 17 & note 9, above.

Dec. 26, 2001), p. 5; *see generally* *BLE v. United States*, 101 F.3d 718, 726-31 (D.C. Cir. 1996).<sup>14</sup>

The application of these factors to the available facts points emphatically toward the conclusion that California Northern's operations on Mare Island did not require Board authority to discontinue.

- **The track's history.** There is no history of this trackage ever having been a "line of railroad." All trackage on Mare Island originated as industrial trackage located on a now-closed military base. *Young V.S.*, ¶ 3. None of that trackage is a remnant of any sort of mainline (or even branch line) where through service was once provided. *Compare SierraPine – Lease & Operation Exemption – Sierra Pacific Industries*, STB Finance Docket No. 22379 (served Nov., 27, 2001), p. 4 (where trackage once was part of a line of railroad, its conversion to switching or industrial use does not obviate the Board's regulatory authority until the Board authorizes that conversion).

Perhaps most telling in this regard, until SFBRR's recent Notice of Exemption, no entity had ever sought or obtained Board authority to operate the trackage on Mare Island, despite the Shipyard's transition to private ownership in the 1990's, long after the ICCTA required Board approval for the construction, acquisition and operation of rail lines. This is a nearly dispositive fact. *See Raritan Central Ry. – Operation Exemption – Heller Industrial Parks, Inc.*, STB Finance Docket No. 34514 (served June 25, 2004), p.

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<sup>14</sup> The Board (and the courts) have emphatically rejected as "too expansive" the notion that all trackage with a connection to the "actual transportation movement between a receiver and shippers in interstate commerce" is within the Board's regulatory authority. *Chicago & N.W. Transp. Co. – Abandonment Exemption – McHenry County*, 3 I.C.C.2d 366, 368 (1987) ("*McHenry*") (dismissing petition for exemption on remand from Seventh Circuit's ruling in *Illinois Commerce Commission v. United States*, 779 F.2d 1270 (7th Cir. 1985)).

4; see generally *The Burlington Northern & Santa Fe Ry. – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, STB Finance Docket No. 33740 (served May 13, 2003), pp. 6-8. Neither California Northern nor anyone else (until SFBRR) sought to invoke the Board's jurisdiction over the trackage on Mare Island, which strongly reinforces that it was viewed by all concerned as trackage outside the Board's jurisdiction under Section 10906. *Raritan Central*, p. 4.

- **The track's physical characteristics.** The trackage on Mare Island – all of which historically served only the U.S. Navy – has the intrinsic physical characteristics of switching, spur and industrial trackage. The photographic tour provided by LMI's Tom Sheaff provides compelling evidence of the trackage's character. See Sheaff Apr. 5 V.S., pp. 8-20 & Exh A. Mare Island contains a rabbit-warren of trackage that crisscrosses the many former-Navy industrial buildings and facilities on the Island. Much of that trackage is laid in streets or other paved areas, it is stub-ended, and all of it was quite obviously configured solely to facilitate the placement of cars for loading and unloading at former U.S. Navy facilities. Sheaff V.S., ¶¶ 5-11 & Exh. A. Much of it, moreover, has been out of use for many years, even during the period of Navy operation; roughly half of the trackage that SFBRR identifies as "immediately serviceable" (SFBRR Pet, p. 6) was not used during the time of California Northern's operation. Sheaff Apr. 5 V.S., ¶ 25 & Exh. A (showing trackage marked by SFBRR but not used by California Northern with dotted yellow line). None of the trackage on Mare Island bears any resemblance to mainline trackage of the sort used by through trains. There are no mileposts or other markers or any kind, as SFBRR acknowledges. SFBRR Rebuttal, ¶ 3. Quite simply, the



track goes nowhere other than the former-Navy buildings, docks and other facilities where railcars were loaded, unloaded, and stored.

An examination of the specific trackage that California Northern used to serve the handful of locations at which it delivered or picked up railcars (always in very small numbers) underscores this point. The trackage used to reach North Pacific Lumber – by far the largest receiver, with about two cars per day – was laid in the middle of Railroad Avenue, and North Pacific unloaded cars with a forklift while part of the street was closed to vehicular traffic. Sheaff Apr. 5 V.S., ¶ 32 & Exh. A (Photo 5). Latham Truss and Alamillo Steel unloaded cars in similar fashion on a spur adjacent to A Street. *Id.*, ¶ 31 & Exh. A.

California Northern's customers at the south end of Mare Island – XKT Engineering, Jeffco, CS Marine and Cooper – were accessed by track that could not be more "industrial" in nature. That track is laid in streets, runs directly adjacent to large industrial buildings, ducks into those buildings to permit the placement of railcars, and crosses itself in numerous locations so as to serve every building from nearly every angle. Sheaff Apr. 5 V.S., ¶¶ 37-41 & Exh. A (Photos 9-15). California Northern did not even use most of the trackage on the south end of the Island; instead, it left railcars these businesses on the tracks in Railroad Avenue, for unloading or further movement by the businesses via forklift. *Id.*, ¶¶ 37-49 & Exh. A.

The trackage at the north end of Mare Island is similar in character. California Northern delivered railcars to three large warehouse-like structures – occupied at the time by EPS, Wines Central and Alco – where the pertinent trackage ducked directly into the buildings to allow for the delivery and unloading of railcars. *Id.* (Photos 26-28).

Although the character of trackage is not by itself dispositive, there can be no doubt that the character of trackage on Mare Island supports the conclusion that it is properly treated as spur, team, switching, or industrial trackage. A more paradigmatic case study is hard to envision.<sup>15</sup>

- **The use of the trackage.** California Northern's use of Mare Island trackage points in the same direction. California Northern used the Mare Island trackage to perform small-volume industrial switching operations, not the line-haul movement of trains. California Northern itself explained to LMI that its operations were those of a "switching carrier." Sheaff Apr. 5 V.S., ¶ 71 & Exh. L.

Mr. Sheaff and Mr. Young describe California Northern's operations on Mare Island prior to their cessation in early 2008. Those operations involved precisely the kind of "pickup and delivery service" that the Board and ICC have consistently regarded as "switching" and not line-haul transportation. The key distinction is whether tracks are used for "through movement of trains" or, instead, for the "discrete movement of groups of cars for assembling with or disassembling from entire trains" and placement at their points of "loading or unloading." See *BLE v. United States*, 101 F.3d at 730-31; see also *Union Pacific – Yolo*, pp. 3-4 (asking whether track is used for "continuous transportation service by through trains between different points") (emphasis added); *San Francisco Belt R.R. – Petition for Exemption – Abandonment*, ICC Finance Docket No. 30884 (ICC served Feb. 12, 1987) ("*San Francisco Belt R.R.*") (applying analysis of *McHenry* to find

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<sup>15</sup> See, e.g., *White River Park Development Commission – Abandonment Exemption Conrail Industrial Track at Indianapolis, IN*, Docket No. AB-311X (served April 19, 1989) (noting that "physical characteristics" of trackage were "typical for industrial or spur trackage").

that switching railroad serving multiple businesses and operating over several miles of lines in port area, and with no through trains originating on or traversing its tracks, operated exempt switching track).

California Northern conducted no through train operations on Mare Island. All of the railcars California Northern brought to the Island were destined for businesses on the Island, and there were no through trains made up, broken down, or operated over Island trackage. Sheaff Apr. 5 V.S., ¶ 13. Whatever through train operations brought railcars for Mare Island businesses onto California Northern's system occurred elsewhere (likely ending at Napa Junction or beyond).

California Northern never maintained a fixed schedule for its service on Mare Island, but instead would arrive on the Island on an as-needed basis with a locomotive and at most a small handful of railcars destined for unloading (or in some case loading) at Mare Island businesses. *Id.*, ¶¶13-14; Young V.S., ¶¶4-6. The volume of those deliveries was quite modest, even at peak levels. As Mr. Sheaff explains, in 2004 and 2005, when traffic levels were at their peak, California Northern brought to the Island at most an average of about five cars per day. Sheaff Apr. 5 V.S., ¶ 15 & Exh. B. By 2006 and 2007, that volume had declined to fewer than two cars per week. *Id.*

Once on the Island, California Northern's locomotive would pull (and often push) cars to the specific locations where they would be loaded or unloaded, all of which were located at or near specific businesses on Mare Island. *Id.*, ¶ 14; Young V.S., ¶¶ 5-6. Mr. Sheaff's verified statement includes photographs of the locations where California Northern delivered cars for unloaded, and he describes the operations involved, all of which were quintessentially "switching" operations. For example, as noted North Pacific

was the “largest” volume rail customer that California Northern served on Mare Island (still only about two cars per day until it moved in 2006), and it unloaded cars when they were parked on the single track that runs the length of Railroad Avenue. Those cars would have to be moved when California Northern switched cars to other businesses located at the south end of the Island beyond North Pacific, such as XKT and Jeffco.

Sheaff Apr. 5 V.S., ¶ 16 & Exh A.

By any reasonable definition, and certainly under the Board’s longstanding view, such operations constitute “switching” and not line-haul through movement of trains. *See BLE v. United States*, 101 F.3d at 730.

• **California Northern’s operations on the trackage were ancillary to its other operations.** There is likewise no question that California Northern’s operations on the Mare Island trackage were merely ancillary to the common carrier service it provided on jurisdictional trackage in the vicinity. Unlike in cases where the Board has asserted jurisdiction over switching trackage because it was the “entirety of a carrier’s line,” California Northern’s operations were not confined to Mare Island. It operated many miles of mainline and branch line railroad trackage in Northern California, as the map accompanying its Notice of Exemption (and attached as Exhibit D to SFBRR’s Petition) illustrates.<sup>16</sup> It delivered specific cars to Mare Island long after any through train operations had deposited those cars (along with others) on California Northern’s system.

The situation here is like that in *Union Pacific – Yolo*, where Union Pacific unsuccessfully sought to invoke the Board’s jurisdiction to avoid being evicted from

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<sup>16</sup> As explained in LMI’s ESO Reply, that Notice of Exemption did not cover trackage between Flosden Acres and Mare Island. *See* LMI ESO Reply, pp. 9-10.

several miles of port-area industrial trackage it had operated for many years. The Board rejected that request, finding that Union Pacific's operations were – like California Northern's here – “ancillary to its already authorized common-carrier line-haul service on other tracks in the vicinity.” *Id.*, p. 4. Even Union Pacific's stated desire to “hold itself out to perform common carrier service” (*id.*, p. 3) – a desire California Northern never had – could not change the fact that Union Pacific still used these miles of track for “loading, unloading, storage, switching, or other purposes incidental to transportation service.” *Id.*, p. 4; *see also, e.g., Louisiana & Arkansas Ry. v. Missouri Pacific R.R.*, 288 F. Supp. 320 (E.D. La. 1968) (pickup and delivery service within port facility deemed excepted switching when performed by line-haul carrier ancillary to its already authorized common carrier line-haul service), *aff'd*, 415 F.2d 751 (7<sup>th</sup> Cir. 1969), *cert denied*, 396 U.S. 1060 (1970); *San Francisco Belt R.R.*, p. 2 (switching service ancillary to common carrier service by connecting line-haul carriers).

The only cases where the Board has asserted regulatory authority over trackage in and around industrial parks, ports and similar facilities used solely for “switching” have been those where the carrier operating or seeking to operate the trackage would, unlike California Northern, be operating *only that trackage*. *See, e.g., Effingham R.R., Petition for Declaratory Order – Construction at Effingham, IL*, STB Docket No. 41986 (served Sept. 12, 1997) (“character of track may be switching, but the larger purpose and effect ... is to construct what will constitute EERC's entire line of railroad”); *Texas Central Business Lines Corp – Operation Exemption – MidTexas International Center*, STB Finance Docket No. 33997 (served Sept. 20, 2002), p. 2 (although Union Pacific had provided service to industrial park on an “unregulated basis,” operations in that park

would be TCBL's "entire line of railroad" and thus "deemed, for purposes of the transaction" a "line of railroad").<sup>17</sup> Indeed, *Texas Central* expressly noted that "pickup and delivery service inside a port facility" *would* be deemed "excepted switching when performed by a line-haul carrier ancillary to its already authorized common carrier line-haul service." *Id.*, p. 3.

- **The trackage is not an "extension."** The Mare Island trackage did not "extend substantially" California Northern's service into a "new territory," much less territory already served by other carriers as contemplated by the Board's precedents. See *Texas & Pacific Ry. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926). As the Supreme Court explained in *Texas & Pacific*, the construction of track is of "national interest" when it extends a carrier's lines into "territory not theretofore served by the carrier . . . particularly where it extends into territory already served by another carrier"). See also *ParkSierra*, p. 5 (asking whether track was "built to invade another carrier's territory." In *Texas & Pacific* itself, the plaintiff carrier alleged that the proposed line would cause it irreparable injury by diverting traffic it was already carrying. 270 U.S. at 264. By contrast, tracks do not constitute an "extension" when they improve facilities "required by shippers already served by the carrier" or allow the carrier to serve "others . . . in the same territory." *Texas & Pacific*, 270 U.S. at 278.

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<sup>17</sup> *Chicago Rail Link, L.L.C. – Lease & Operation Exemption – Union Pacific R.R.*, STB Finance Docket No. 33323 (served Sept. 2, 1997), is not inconsistent with this conclusion. In that case, the carrier was affirmatively seeking to invoke the Board's jurisdiction over its new leased lines, and those lines would be used to serve new customers already served by another carrier, thus bringing the case squarely within the "extension" line of cases exemplified by *Texas & Pacific*, discussed in the next section.

The Mare Island trackage could not have achieved any "extension" or "invasion," since it originated as an entirely in-house railroad for the Navy's sole benefit. When California Northern began operating on Mare Island, moreover, that carrier already served Vallejo, California, as well as numerous other points in Northern California in close proximity to Mare Island, and thus gained no "new territory" by switching cars on the Island. As a result, there was no "extension" for California Northern either.

As in *Union Pacific – Yolo* and countless other cases where existing carriers have commenced operations in new industrial parks or port facilities in the vicinity of their existing networks, the trackage they use to deliver and pick up cars at these locations is exempt switching track under Section 10906 notwithstanding that the trackage allows them to serve multiple new customers, *Union Pacific – Yolo*, p. 3 (UP served multiple customers in port area); *Texas Central Business Lines Corp – Operation Exemption – MidTexas International Center*, STB Finance Docket No. 33997 (served Sept. 20, 2002), p. 2 (Union Pacific had provided service to multiple customers in industrial park on an "unregulated basis").<sup>18</sup>

The fact that there was no "extension" here is even more clear in light of the fact that California Northern could have (and in fact did) participate in traffic moving to Mare Island via other points on its system. Even before California Northern departed Mare Island, North Pacific Lumber had relocated to a new facility in nearby Napa, which California Northern also served. Sheaff Apr. 5 V.S., ¶ 18; SFBRR Pet., Exh. D (showing

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<sup>18</sup> As cases such as these illustrate, moreover, the fact that trackage would be used to switch multiple new customers does not render it a line of railroad. See, e.g., *Great Northern Ry. Abandonment*, 247 I.C.C. 407, 408 (1941) ("controlling factor in the classification of track is the use made thereof and not the number of patrons served").

California Northern's line to include "Napa Branch"). Similarly, after California Northern departed the Island in early 2008, XKT and Alamillo transloaded railcars delivered by California Northern to American Canyon, California, a nearby location on California Northern's Vallejo Branch. *See* Sheaff Apr. 5 V.S., ¶ 72; *see also* SFBRR Pet., Exh. E (XKT letter); Exh. J (Alamillo letter); & Exh D (showing California Northern service on Vallejo Branch between Vallejo and Napa Junction (where included American Canyon is located). There is no conceivable extension in these circumstances. *See NYCEDC*, pp. 5-6 (no extension where carrier could serve traffic via new facility from other points on its system); *see also BLE v. United States*, 101 F.3d at 728.

\* \* \*

Under all of the Board's tests for determining whether trackage constitutes a "line of railroad" subject to the Board's jurisdiction, the trackage on Mare Island must be regarded as exempt switching and industrial track that California Northern was free to abandon without the need for regulatory approval. As a result, even if California Northern ever provided service on this trackage that would qualify as "common carrier" service (and as we demonstrate in the next section, it could not have), any common carrier obligation attached to the trackage disappeared when Californian Northern departed in 2008.

**B. California Northern's Operations on Mare Island Could Not Have Given Rise to any Common Carrier Obligation Because It Was Well Understood that those Operations Were Temporary and Contingent**

Whatever the Board's view of the application of Section 10906 to the rail trackage on Mare Island, an essential link in SFBRR's position is that California Northern's operations on that trackage were those of a common carrier, such that they gave rise to a common carrier obligation that SFBRR asserts (incorrectly, as discussed



above) remains with the trackage. *See* SFBRR Rebuttal, ¶ 3 (asserting “common carrier service was provided using this line”).<sup>19</sup> That link is missing here, however. Although California Northern was a common carrier with respect to the rail system it leased and operated, *when switching cars for customers on Mare Island* California Northern’s operations could not have been those of a common carrier.

We have already explained that California Northern’s operations were never authorized by the Board. It is also clear that California Northern never intended to conduct common carrier operations on the Island. When it departed Mare Island it informed LMI that its operations on the Island were those of a “switching carrier,” that it had not “held itself out to be a common carrier for service on Mare Island,” and that its operations were “not common carrier operations.” *Sheaff* Apr. 5 V.S., ¶ 71. The City of Vallejo similarly did not regard California Northern’s operations to be those of a common carrier. *City of Vallejo Reply*, p. 5 (“City disputes the presence of any pre-existing common carrier rights or obligations on the line”); *see also id.*, pp. 4, 7.

In addition, and crucially, California Northern’s switching service on Mare Island could not have given rise to any common carrier obligation because of the somewhat unique circumstances of Mare Island’s ongoing transformation from a military base to a mixed-use civilian community. Although California Northern was able for a time to operate and switch cars using Mare Island trackage, it could not have held itself out as a common carrier – with the concomitant ability and obligation to respond to any and all

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<sup>19</sup> Were those operations not “common carrier” operations in the first place, the Board could not have jurisdiction. *See Hanson Natural Resources*, p. 21.

reasonable requests for service – because of the limitations placed on its then-present and future ability to operate by LMI and its ongoing redevelopment of the Shipyard.

It has long been established that “the principal test of common carriage is whether there is a bona fide holding out coupled with the ability to carry for hire.” *Atchison, Topeka & Santa Fe Ry. Co., et al. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915) (“*Kansas City Stock Yards*”). As the Board has said more recently, “[a]t a minimum, under agency precedent, for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire.” *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245 (served Sept. 15, 2009), p. 5. The “ability” to operate as a common carrier, of course, requires not merely the ability to carry some shipments at some places or some times, but the ability to respond to all reasonable demands for service by any and all customers, subject only to narrow exceptions. That is the very essence of what it means to be a common carrier. *Union Pacific R.R. Co. – Petition for Declaratory Order*, Finance Docket No. 35219 (served June 11, 2009), p. 3-4 (applying common carrier obligation to require carrier to establish rates for long-distance shipments of highly-toxic chlorine); *see also* 49 U.S.C. § 11101(a).

As the ICC explained in *Bell Coal & Navigation Co. Application*, 223 I.C.C. 433, 436 (1937), a carrier’s “mere expression of willingness to carry for others” does not make it a “common carrier.” Rather, “[t]o constitute a common carrier there must be a genuine holding out to carry for all, which implies, among other things, the availability of goods for carriage, and the existence, and ownership or control, of terminal and other facilities for such carrier.” *Id.* *see also, e.g., James Riffin – Petition for Declaratory Order*, p. 6 (no property or contract rights allowing Riffin to operate); *Keokuk & Hamilton Bridge*

*Co. v. W. Ry.*, 66 I.C.C. 545, 548 (1922) (entity not a common carrier where it did not have “the motive power or cars to perform such transportation”); *State of Vermont and Vermont Ry., Inc., Acquisition & Operation in Vermont*, 320 I.C.C. 609 (1964) (no common carrier status where entity was not “empowered to operate” by enabling legislation); *Kansas City Stock Yards*, 33 I.C.C. at 101 (entity not a common carrier because its holding out was not genuine in view of expectation that service would not actually be used).

California Northern could not genuinely have held itself out as providing common carrier service because it – and all concerned – knew that it could not control its ability to provide service at any given point or any given time, or indeed anywhere on the Island: it had no ownership of any track, it could not override the many environmental, infrastructure and other needs entailed with the Island’s redevelopment, and it could not expect that rail service would be permitted at any given point in light of future land use decisions being made by LMI, the City of Vallejo and numerous other stakeholders. Sheaff Apr. 5 V.S., ¶¶ 22, 57-62.<sup>20</sup> California Northern’s operations were subject to LMI’s control, as it was always understood by all of the stakeholders in Mare Island’s redevelopment (California Northern, the City of Vallejo, and all businesses on Mare Island) that rail service was subject to interruption or termination based on numerous

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<sup>20</sup> With respect to the customers it served at the times and places where service was possible, California Northern’s status was at most that of a contract carrier. Unlike a common carrier, a contract carrier is “an entity which, without holding itself out to the public as ready to act for all who desire its services, undertakes, by special arrangement in a particular instance only, to transport property from one place to another either gratuitously or for hire.” *Hanson Natural Resources*, p. 18 n.10.

contingencies relating to the ongoing redevelopment of the Island, and that the future of rail service on the Island, or at any given point thereon, was entirely speculative. *Id.*<sup>21</sup>

Even now, the path of redevelopment – including such critical steps as the determination where rail easements will exist, where property lines will be set, what public uses must be accommodated – is not certain, and there can be no definite determination of the future scope or even location of any rail operations on Mare Island such as to make possible the kind of bona fide holding out that could give rise to a common carrier obligation. What is certain is that redevelopment will need to be accommodated, and may prevent or impose strict limits on rail service on much of the trackage SFBRR wishes to operate. *Id.*, ¶¶ 30, 38, 44, 45, 47-49, 51, 53, 54, 77.

In numerous contexts the Board has consistently concluded that limitations of the sort placed on California Northern's operations by LMI and the Shipyard's redevelopment are inconsistent with full exercise of the common carrier obligation. Had a common carrier obligation pre-existed the redevelopment of the Island, such limitations might not have been possible consistent with Section 11101. However, since no such obligation could have pre-dated California Northern's arrival, those same limitations prevented any *new* common carrier obligation from being created.

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<sup>21</sup> SFBRR implies that any redevelopment needs could be accommodated by a temporary "suspension" of rail service – perhaps via an "embargo" (SFBRR Rebuttal, ¶ 6), but embargoes exist to address inherently unpredictable and temporary interruptions, not the sort of pervasive and potentially permanent alterations of the sort occasioned by the transformation of Mare Island. *Central Oregon & Pac. R.R., Inc. – Coos Bay Rail Line*, Finance Docket No. 35130 (served April 11, 2008), p. 3 ([T]he obligation to provide rail service upon reasonable request "is not absolute . . . and may be *temporarily suspended* if the rail carrier is incapable of providing service. Such incapacity may arise from physical conditions affecting safety such as weather and flood damage, tunnel deterioration, or operating restrictions due to traffic congestion.") (emphasis added).

The Board has addressed the common carrier obligation in the context of transfers of railroad assets to governmental bodies and other entities that desire not to become carriers, and therefore seek to have the freight carrier retain its common carrier obligation. The Board has allowed such conveyances without the need for the transferee to obtain regulatory approval when the freight carrier retains the full ability to exercise its pre-existing common carrier obligation. *Maine, DOT – Acquisition Exemption, Maine Central R.R.*, 8 I.C.C.2d 835 (1991) (“*State of Maine*”). But the Board has consistently required regulatory approval when the conveyance places limits on the freight carrier’s ability to operate as a common carrier – limits of the same sort that LMI consistently placed on California Northern’s operations on Mare Island.<sup>22</sup>

For example, in *Southern Pacific Transportation Co. – Abandonment Exemption – Los Angeles County, CA*, 8 I.C.C.2d 495 (1992), the ICC found that agreements for a sale of the physical assets relating to three Southern Pacific lines placed substantial limitations on Southern Pacific’s ability to provide local freight service by subjecting that service to the “directives and control” of Los Angeles County and allowing the County’s proposed passenger service to “significantly restrict freight service.” 8 I.C.C.2d 495, 508 (1992). Similarly, in *Public Service Co. of Colorado – Acquisition Exemption – Line of the Colorado & Wyoming Ry.*, ICC Finance Docket No. 32264 (ICC served Nov. 10, 1993), the ICC concluded that PSC’s acquisition of trackage from the serving carrier required approval because PSC would have obtained the “ability to control operations

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<sup>22</sup> As the Board has recently explained, it “will look to whether the third-party operator has obtained a permanent easement and sufficient interest and control over the Line to permit it to carry out the common carrier obligation.” *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Ry.*, STB Finance Docket No. 35128 (served Oct. 27, 2008) (“*Port of Seattle*”), p. 3.

over the line,” making the carrier’s rights “too circumscribed and tenuous to permit it fully to carry out its common carrier obligation.” *Id.*, pp. 9-10. *Compare Port of Seattle*, p. 4 (“nothing in the draft quitclaim deeds or the O&M Agreement – the only documents submitted to us – gives the Port the ability to interfere unduly with the transferee’s ability to carry out the common carrier obligation”).

To similar effect is *Limits Industrial Building Corp.*, where the ICC recognized that impediments – both physical and legal – to a carrier’s access to a shipper’s facility meant that the carrier had no common carrier obligation to operate over trackage serving the facility. 258 I.C.C. at 441-42.

These principles explain why California Northern could never have held itself out as a common carrier. LMI did not impose new limitations on a carrier that had been operating common carrier service on Mare Island for many years. To the contrary, California Northern’s operations commenced at a time, and in a context, where it was always manifestly clear that the landowner whose track California Northern used had control over when, where and whether rail service could be provided. California Northern’s ability to continue providing rail service was subject to that control, and was always speculative – not just for business reasons, or because of impermanent contract rights (or the lack thereof), but because the future redevelopment of the Island would preclude rail operations altogether or place stringent limitations on them. *Sheaff* Apr. 5 V.S., ¶ 22.

The declaratory order SFBRR requests would inappropriately sweep away those limitations and contingencies – all of which California Northern was subject to – and would hold the ongoing redevelopment of Mare Island hostage to SFBRR’s own

parochial desire to operate a railroad on the Island. The Board should not allow its processes to be misused in this way.

In this context, the Board's analysis in *SMS Rail Service, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34483 (served Jan. 19, 2005), is also instructive. In that case, SMS Rail Service – unlike California Northern – had sought and obtained Board authority to operate as a common carrier, and also possessed the legal right to operate on trackage serving multiple customers in Paulsboro, New Jersey. Norfolk Southern petitioned to revoke the exemption, asserting that SMS would not in fact be operating as a common carrier. The Board explained that “the fundamental test for determining whether an entity is a common carrier is whether there has been a holding out to serve the public as a common carrier,” and articulated several factors that bear on this determination: “[W]hether an entity is functioning as a common carrier, or not, at any given location depends on a variety of factors, including: (1) whether the entity providing the service is holding itself out to the public as a common carrier and intends to be so classified; (2) whether the track owner and the operator have taken steps to clarify the status of the trackage and the operations over it; and (3) whether the track owner consents or objects to the railroad's provision of common carrier service over its tracks.” *Id.*, pp. 7-8.

Unlike in the *SMS* case, all these factors point to California Northern not having operated as a common carrier. It plainly did not “intend to be so classified.” When it departed Mare Island permanently in early 2008, it explained to LMI that its operations were not those of a common carrier. And we also know it sought no Board authority to begin operating on Mare Island, as a common carrier or otherwise. By contrast, in the

*SMS* case SMS Rail Service had applied for Board authority based on the representation that it intended to hold itself out as a common carrier. *Id.*, p. 2.

The second *SMS* factor is not squarely applicable on these facts, where the trackage in question had not historically been operated by any carrier (other than the Navy's private railroad), much less a common carrier. But to the extent it does apply, the record is clear that all concerned were consistently informed about the speculative and interruptible nature of rail service on Mare Island. Nobody could reasonably have believed that California Northern was operating as a true common carrier – able to respond upon demand to any and all reasonable calls for service. Sheaff Apr. 5 V.S., ¶¶ 57-62.

The third factor in the *SMS* framework points even more strongly to the conclusion that California Northern was not operating as a common carrier when it came to Mare Island. As this proceeding attests, at no point in time has LMI consented to California Northern (or any other carrier) taking on the status of a common carrier on the trackage LMI owns. When LMI acquired the Mare Island trackage, that trackage had never been subject to the Board's jurisdiction or regulatory approval. The mere fact that LMI allowed California Northern to conduct limited and circumscribed switching operations on its trackage did not thereby bring the Mare Island trackage within the Board's jurisdiction or transform the operator into a common carrier. *See, e.g., Willis, C.P.A.*, p. 3 (common carrier operating over private track that does not use track to perform common carrier service or maintain track with its own funds is not subject to the Board's jurisdiction). LMI has consistently declined to give rights to California Northern or any carrier that would give rise to a common carrier obligation and thereby conflict



with the ongoing redevelopment project on which LMI and others have toiled so mightily. The Board should not override LMI's determination.<sup>23</sup>

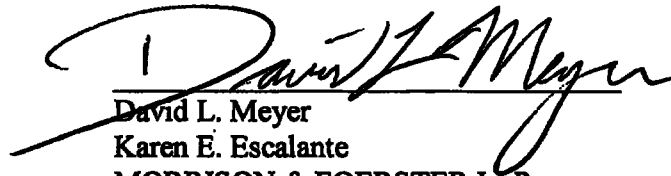
## CONCLUSION

SFBRR asks the Board to declare that it has rights that it simply does not have. The Board should reject that request, and it should also decline SFBRR's invitation to engage in an abstract determination of the regulatory status of trackage on Mare Island, which no shipper or potential shipper has sought. If the Board were inclined to address these issues, it should conclude that the trackage on Mare Island is not subject to any extant common carrier obligation, and the Board should in particular avoid having its processes – and the hammer of statutory preemption – intrude in the highly complex, cooperate, multi-year process of redeveloping Mare Island. LMI desires that the redevelopment process result in rail service being an option for Mare Island businesses, but the best way for that objective to be realized would be for the Board to refrain from intervening at this time. The Board should accordingly deny the declaratory order sought by SFBRR.

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<sup>23</sup> See, e.g., *James Riffin – Petition for Declaratory Order*, pp. 3-4 (declining to override decision of landowner not to provide rights Riffin sought “to provide transload service to a number of local shippers at the eastern end of the spur and to interchange with NSR at the western end”).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Meyer", is written over a horizontal line.

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April 5, 2010

# **CERTIFICATE OF SERVICE**

I, Karen E. Escalante, certify that on this date a copy of the Reply of Lennar Mare Island, LLC in Opposition to Petition for Declaratory Order, filed on April 5, 2010, was served by email and by first-class U.S. mail, postage prepaid, on all parties of record, specifically:

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\_\_\_\_\_  
Karen E. Escalante

Dated: April 5, 2010

**Finance Docket No. 35360**

**Verified Statement of Thomas Sheaff**

**Exhibit 1**

**VERIFIED STATEMENT**

**OF**

**THOMAS SHEAFF**

1. My name is Thomas Sheaff. I am a Vice President and an officer of Lennar Homes of California, the sole member of Lennar Mare Island, LLC ("LMI"). I have previously submitted a verified statement in this proceeding. I am providing this statement in connection with the Petition for Declaratory Order filed by San Francisco Bay Railroad-Mare Island ("SFBRR").

2. My statement addresses five principal topics:

- (a) the characteristics of railroad trackage on Mare Island;
- (b) the nature of operations provided on the Island by California Northern prior to its cessation of operations in early 2008;
- (c) a further elaboration of the ways in which the rail service proposed by SFBRR (and associated "common carrier obligation" and asserted rights of "preemption") would conflict with the Island's redevelopment;
- (d) the reasons for the decline in rail traffic on the Island in 2006 and 2007 and the circumstances surrounding California Northern's cessation of service on the Island; and
- (e) the consistent message delivered by LMI and the City of Vallejo that rail service was inherently subject to interruption and even termination, and the future of rail service was speculative in light of the ongoing redevelopment of the Island.

3. I also reiterate LMI's interest in establishing rail service on Mare Island as an option for Mare Island businesses, provided that goal can be achieved in a manner consistent with Mare Island's ongoing redevelopment in the interests of all of the stakeholders that have been toiling for years to bring it to fruition. The rights SFBRR demands are antagonistic to the goal of long-term rail service that is compatible with the Island's redevelopment. LMI asks the Board not to impose this adversary into the midst of a cooperative process that has been working, and offers the best hope of bringing long-term rail service to a fully-redeveloped former Navy Shipyard.

4. This statement is a companion to the one I submitted on March 22. I will not repeat the points I made there, but will elaborate on them with specific additional examples and context.

5. For convenience, I address topics (a)-(c) together by reviewing in some detail the trackage on Mare Island, some that California Northern used to provide switching services and some that to my knowledge California Northern never used. SFBRR marked all of this trackage with yellow on the map accompanying its Petition (as Exhibit C), and appears to claim the right to operate over this track, whether or not California Northern had ever operated on it.

#### **Overview of Railroad Trackage on Mare Island**

6. As I have described previously, and as depicted on the maps and in the photos accompanying this Statement (as Exhibit A), the railroad trackage on Mare Island consists of dead-ended track that allows railcars to be delivered or picked up at many of former-Navy Shipyard buildings located on the Island. The first two pages of my Exhibit

A are a satellite map on which I have highlighted the same trackage that SFBRR highlighted on the Exhibit C map accompanying its March 15, 2010 Petition.

7. I note at the outset that much of the trackage highlighted by SFBRR was not used by California Northern when it operated on the Island. As I will describe in more detail, the trackage that California Northern operated over is marked on my Exhibit A with a solid yellow line and that which California Northern did not use is marked with a dotted yellow line.

8. Referring to my Exhibit A, rail trackage enters the Island using the Mare Island Causeway, curves to the south and then follows Railroad Avenue (and in most locations is laid within the vehicular traffic lanes of the street) to a dead end near several former-Navy piers. As I will show in detail, along Railroad Avenue there are numerous switches that allow stubs of track to diverge to reach several of the former-Navy buildings and industrial yard areas. One set of tracks loops behind the facility now used by XKT Engineering ("XKT"), which had been used by the Navy for major Shipyard-related manufacturing.

9. Towards the south end of this trackage, another dead-end track diverges to the north to follow Nimitz Avenue. This track passes close to the former-Navy drydock facilities and ends in the "Historic Core" of the old Navy Shipyard, where there is a Museum now operated by the Mare Island Historic Park Foundation that is open to the public. Between Nimitz Avenue and Railroad Avenue, a variety of other tracks crisscross the various industrial buildings located in this area of Mare Island.

10. Another track diverges from the Railroad Avenue trackage near A Street (located fairly close to the Causeway). That track briefly heads east and then turns north

to follow Azuar Drive in order to reach four large former-Navy warehouse buildings. These buildings are located in this part of Mare Island (somewhat remote to the other industrial areas of Mare Island) to serve specific navy purposes. For example, the Navy used Building 627 (currently used by Earthquake Protection Systems ("EPS")) to store munitions. Tracks diverge into each of these buildings to allow for the loading and unloading of railcars.

11. Track on Mare Island was historically installed by the U.S. Navy for specific purposes, such as to allow movement of railcars between specific buildings or facilities (such as the drydocks mentioned above). There was no master planning for the web of trackage that ended up in Mare Island's streets and industrial areas, and the Navy did not have to conform any of that trackage with the safety regulations, building codes, and other standards that would have governed it in the civilian world.

#### **Overview of California Northern's Operations on Mare Island**

12. I have been involved in LMI's redevelopment of Mare Island since 1998, and as a result am familiar with the rail operations that California Northern conducted using Mare Island trackage until those operations ceased in early 2008.

13. California Northern would arrive at the Island from time to time with a locomotive and a small number of railcars for placement at various points on the Island, and it was unusual for California Northern to deliver more than eight cars in one day. I never witnessed California Northern bringing trains to the Island containing cars destined for other locations. Some weeks California Northern would come to the Island many days during the week, and during other weeks it would come only once. California



Northern rarely operated on weekends. There was no discernable schedule to its operations.

14. After arriving on the Island, California Northern's locomotive would both pull and push cars to various locations. I will review below in more detail the specific locations where California Northern placed cars for unloading (or loading in some cases), but in general it moved south along Railroad Avenue as far as the north end of XKT's leased area, and it moved north along Azuar Drive as far as Alco.

15. LMI kept track of the number of cars that California Northern switched to each point on the Island. (LMI kept complete and accurate records so that it could bill users for their pro-rata share of LMI's rail-related maintenance and inspection expenses, which I discuss below.) The volume of California Northern's deliveries was quite modest, even at their peak during 2003 and 2004. Exhibit B depicts that data for the period from late 2002 through the end of California Northern's operations in March 2008 (which is the entire period for which LMI has data). As shown on Exhibit B, the largest volume of traffic ever reached was in the second quarter of 2004, when California Northern delivered just over five cars per day on average. (These daily averages were calculated by dividing quarterly totals by 91 days; however, California Northern did not operate every day, or even most days, and rarely on weekends.)

16. The business that received the largest number of railcars was North Pacific Lumber, which leased a facility along Railroad Avenue near A Street. There was no switch or spur serving North Pacific's facility. Instead, California Northern simply left cars on the single track in the middle of Railroad Avenue for unloading by North Pacific. Needless to say, when California Northern had cars to deliver to customers south of

North Pacific (especially XKT and Jeffco), it had to move North Pacific's cars out of the way in order to move south.

17. During the last 18 months of California Northern's operations on Mare Island (mid-2006 through early 2008), traffic volumes were comparatively tiny, averaging fewer than two cars per week, as shown on Exhibit B.

18. A principal reason for this decline in railcar volumes was the exit of two of the businesses that had accounted for the lion's share of all rail traffic on Mare Island. As noted above, the "largest" single customer by far was North Pacific Lumber. As shown on Exhibit B, North Pacific accounted for almost half of all of California Northern's deliveries (or about two cars per day). North Pacific left the Island in the early part of 2006 when it relocated to a facility in nearby Napa, California (also served by California Northern). As the article that accompanied SFBRR's Petition (as Exhibit G) explains, North Pacific moved because it found longer term space in the Napa location. North Pacific had leased space on Mare Island on a short-term basis, because the City of Vallejo's "Reuse Plan" and "Specific Plan" both emphasized job creation and called for "Mixed Use: Office / Light Industrial" development at North Pacific's location. These planning documents, approved by the Vallejo City Council, did not allow warehousing and distribution of large products, such as lumber distribution, primarily because such uses did not meet the City's objectives for job creation. North Pacific (along with Latham Truss across the street) was well aware of this issue, and therefore, I met and communicated with them frequently while North Pacific assessed opportunities to relocate its operation to other space. When the space in Napa became available, North

Pacific relocated so as to have a longer-term arrangement for space. SFBRR in incorrect in attributing North Pacific's departure to rail service issues.

19. Another of the Island's "biggest" rail customers (accounting for one or two deliveries per week) was Wines Central, which operated a wine storage business in a former-Navy building now owned by EPS. Wines Central ceased operations in late 2005 after a devastating fire destroyed its entire operation. (The fire was caused by arson, and the perpetrator, a Wines Central customer, was subsequently convicted.) The building was damaged, but held up well because of its construction as a munitions storage facility. The building was acquired by EPS in 2009, but it is not currently in use.

20. Three other former rail customers listed on Exhibit B are no longer on the Island. Latham Truss left Mare Island when its business declined due to the housing and construction downturn. Weston Solutions was an environmental remediation contractor that the U.S. Navy hired on a one-time basis in 2006 to remove contaminated soil, which California Northern moved off the Island by rail on the Navy's behalf.

21. Another business, Bio-Energy, conducted bio-diesel operations in a building along Nimitz Avenue. Bio-Energy received a few deliveries by rail in 2005; those cars were unloaded along A Street (at the location shown in Photo 3 in Exhibit A). Bio-Energy's business was inherently speculative, and it shut down a few years ago.

22. California Northern also carried out its operations under LMI's supervision and subject to limits LMI placed on those operations. California Northern was aware of the vehicle traffic patterns and redevelopment activities, and it conducted its operations so as not to interfere with such projects as Causeway maintenance and capital improvements to infrastructure. California Northern conducted its activities at

non-commute times, and would switch cars during the middle of the day so as to not disrupt business activities on Mare Island. California Northern did not place or store rail cars or transload except in locations that LMI allowed, so as not to disrupt development and operations, including installation of infrastructure, access, and leasing of commercial buildings. California Northern's railcar unloading activities were always conducted in coordination with the City, LMI and the rail customer. In contrast, SFBRR has clearly indicated that it has no regard for any of the difficult development issues, local agreements, or strategies that are consistent with the best interests of Mare Island as a whole. California Northern worked closely with LMI, they provided advance notice and sought approval for activities beyond normal switching, and as a result, operated in a manner that allowed for coordination and operational compatibility with non-rail customers, residents and the many other stakeholders. Similarly, Mare Island Rail Service (which I addressed in more detail in my previous Statement) has agreed that it is willing to switch cars to existing and future customers in a fashion that is sensitive to the need for Mare Island's redevelopment process to continue.

**Detailed Tour of Mare Island Trackage**

23. An examination of the specific trackage on Mare Island, some of which California Northern used to serve the handful of rail customers to which it delivered or picked up railcars, helps to illustrate the nature of trackage on Mare Island, as well as some of the challenges that rail operations pose for the Island's redevelopment.

24. Included in Exhibit A are detailed aerial photos showing the locations where rail trackage exists on Mare Island, and even more detailed ground-level photographs of specific locations. The satellite overview map marks the locations

covered by the "Overview Aerials." For example, Overview Aerial A depicts the rectangular area marked by the dashed pink line on the first page of the satellite map. As shown on the Key, throughout Exhibit A streets (e.g., Railroad Avenue) are labeled with green boxes, former rail customers (e.g., XKT) and the one current customer (Alstom) are labeled with blue boxes, and other points of interest or notations are in yellow boxes. The Overview Aerials use orange arrows to mark the locations (and direction) of the detailed ground-level photographs that are set forth later in Exhibit A. For example, numbered arrow "1" refers to Photo 1, which was taken facing to the west and shows the rail trackage exiting the Causeway onto Mare Island.

25. Using these Aerials and accompanying photographs, I will provide a visual tour of the Mare Island rail trackage over which SFBRR says it has the right to operate (including for purposes of transloading and car storage). Again, rail trackage that SFBRR highlighted on its Exhibit C map is shown in my Exhibit A in yellow: solid yellow denotes track that California Northern used; dotted yellow denotes track over which California Northern did not operate.

26. Overview Aerial A shows the Causeway and Alstom. On the left (or south) side of this view, track heads south within the right of way of Railroad Avenue. At the top (or west) of the view, track heads west on A Street and then turns north to follow Azuar Drive.

27. As noted above, Photo 1 shows trackage leaving the Mare Island Causeway and entering Mare Island. Photo 2 shows Alstom's facility and the short spur that SFBRR has been using to deliver railcars (Amtrak Superliners for refurbishing) to Alstom. As I have previously explained, Alstom's lease with LMI allows it to arrange

for railcar deliveries to it (and it alone) on this spur. The only operations SFBRR has been conducting anywhere on the Island have involved the delivery of cars to Alstom at this location.

28. Proceeding to the south along Railroad Avenue, the trackage is depicted on Overview Aerial B. After crossing A Street, the trackage passes between the facility formerly occupied by North Pacific, and the Building 507 location of Alamillo Steel (which had previously been used by Latham Truss).

29. Redevelopment of Mare Island could still require environmental remediation in this area. I do not expect that the State of California Environmental Protection Agency will issue a "No Further Action" letter until 2011.

30. In addition, the entire Railroad Avenue corridor is one example of an area that will require extensive infrastructure work in (as noted on the various photos along this corridor). That work, which has undergone significant planning and has been conceptually approved, could require removal of the track and complete rebuilding of the street structure and utilities under the street. At the very least it will require significant interruptions of vehicle and rail traffic in order to complete rebuilding of the street structure and, likely, the utilities under the street. Replacement of the track is uncertain due to lack of funding for the steps needed to meet requirements imposed by the California Public Utilities Commission and the City of Vallejo. The City of Vallejo and LMI currently have a meeting scheduled on April 15, 2010 to address this issue. For many reasons, including the yet-to-be-determined infrastructure requirements, during the entire time California Northern was operating on the Island, and continuing to this day, there were significant doubts on the part of the participants in the planning process –

including the City of Vallejo and LMI – whether it made sense to restore rail trackage in Railroad Avenue, as I explain further below. A June 2008 presentation on the Railroad Avenue infrastructure project gives a good idea of the extensive scope of this work, the complexity of the issues resulting from old Navy utilities and rail trackage, and the obvious impact on the existing rail trackage. *See Exhibit C hereto.*

31. Photo 5 is a ground level view (looking north) showing the Alamillo and North Pacific Lumber facilities on opposite sides of Railroad Avenue. A switch at this location allows a spur to diverge to the right into the facility that was leased by Latham Truss until it shut down. Alamillo Steel has since leased this building. However, California Northern did not deliver railcars to Latham Truss (or Alamillo) here; instead, it placed cars for these customers on tracks near A Street (shown on Photo 3 and discussed below) for unloading.

32. There is no switch or track serving the old North Pacific facility. Instead, as noted on Photo 5, California Northern left cars in the middle of the southbound traffic lane of the street for North Pacific to unload with a forklift, requiring the street to be partially shut down to accommodate the loading and unloading.

33. The Railroad Avenue track continues south in the street past the VA Clinic and other businesses along this principal thoroughfare. Overview Aerial C shows this area in more detail. Photo 6 shows the track passing the VA Clinic, where Railroad Avenue is used for parking and access, which would be incompatible with any kind of railroad transloading or car storage operation.

34. Photo 7 shows the track passing the building leased by MuriGenics, another Mare Island business. As is obvious from this photo, MuriGenics depends on

uninterrupted access to Railroad Avenue for employee and customer parking, handicapped access, access for garbage service and general deliveries. This is another example of a site, typical on Mare Island, where land uses must be compatible. This building – the former dispensary on Mare Island – is also one of the 502 historic resources at Mare Island, and the City specifically required this building to be retained and developed. Today, a biotechnology firm occupies the building. The only reasonable use of the rail line at this location would be as a means of moving rail cars beyond this point to the heavy industrial area to the south.

35. The track continues to the south in Railroad Avenue, as shown on Overview Aerial D. It passes numerous former-Navy industrial buildings and continues south into the area shown in Overview Aerial F. In this location, Railroad Avenue passes between large industrial structures: XKT's facility, which the Navy used for heavy manufacturing, and Jeffco's facility, which the Navy used for large painting projects. This area has numerous old and long-unused tracks crisscrossing the streets and snaking among the various former-navy structures.

36. Photo 8 shows the Railroad Avenue trackage passing Building 1310, which was used as a Navy "pipe shop" but is currently vacant. As elsewhere on Railroad Avenue, transloading or storage of railcars here would interfere with parking, access, the marketing and leasing of this space for commercial use, as well as with the future infrastructure and utility work.

37. Photo 9 is a view towards the south between the XKT facility (on the right) and the Jeffco facility (on the left). When California Northern operated on Mare Island, it delivered railcars to these facilities (as well CS Marine and Cooper, which are



located farther southeast) by leaving them on the trackage on Railroad Avenue shown in the foreground for loading and/or unloading by these businesses, and in some cases the businesses would push railcars into their facilities using forklifts.) California Northern could not go past this point because the switch that is visible in Photo 9 had been taken out of service by track inspectors hired by LMI – Kennedy Wilson. An email confirming this fact sent to me by Dave Scherer, who worked for Kennedy Wilson at the time, is attached as Exhibit D, and notes that the only use of the track “was for internal use by Jeffco.”

38. Both XKT and Jeffco use the area between the buildings for storage, parking, logistics, exchange of large equipment and projects, and other operations. LMI has met with both of these businesses on multiple occasions since 1998 during LMI’s planning of the area, including parcelization, and it was determined many years ago that the best short-term and long-term plan was to make this area private property and close the street for public access, so that the area would be more suitable for these types of industrial uses. Open yard space is at a premium on Mare Island because of the presence of several hundred historic resources and the fact that the U.S. Navy built out the Island in a way that did not have to comply with normal or standard guidelines (for example, as to parking, coverage ratios, access, turning radius, clearances, etc.). Consistent with LMI’s uses and planning effort (which planning effort has been approved by the City of Vallejo in the Specific Plan, which includes a full Environmental Impact Report), Railroad Avenue is not a thoroughfare today, has not been one since 1998, and is not expected to become one in the future. The entire area shown in this photograph is slated to be parcelized and conveyed to the entity that ultimately acquires the parcels used by

Jeffco and XKT in accordance with the Specific Plan. A “common carrier” rail line, with or without the threat of transloading or car storage, would be incompatible with current industrial operations and the future use plan for this area.

39. As shown in the top portion of Overview Aerial F, SFBRR has proposed to operate trackage that diverges from Railroad Avenue and passes behind XKT’s facility and through the yard it uses for its fabricating business. Photo 10, Photo 11, and Photo 12 provide various views of the trackage in this area, much of which has not been used for a very long time, and all of which exists solely to serve this former-Navy building. Photo 15 is a view of the track entering XKT’s yard from Railroad Avenue at the south end of that facility. All of these photos show the potential for disruption to the heavy equipment, cranes, and pipe inventory that are used by XKT as part of its business. To my knowledge, California Northern never operated on the spur line within XKT’s yard area, as deliveries were directed to Railroad Avenue. Numerous historic aerial photos support the fact that this track has not been used, or even accessible, for ten years or more.

40. Photo 13 and Photo 14 are views of Jeffco’s facility along Railroad Avenue, where Jeffco moves materials around to serve its business. Photo 13 shows the spur going into the paint facility. Jeffco uses its own flatbed rail cars to move its inventory efficiently around its facility. Photo 13 also shows large pipes resting immediately adjacent to railroad trackage that SFBRR has proposed to operate over. Photo 14 shows a newly painted product on the other side of the paint facility and material on top of trackage.

41. The area to the south of XKT and Jeffco is depicted in Overview Aerial G and Overview Aerial H. California Northern did not operate on trackage in this area. The very small number of rail deliveries to customers in this part of the Island were made elsewhere. In any event, there were very small numbers of such shipments: CS Marine received a grand total of 11 cars between 2002 and 2008, and Cooper received a total of only four cars between 2002 and 2008. The Cooper location is shown on Overview Aerial E.

42. Old U.S. Navy trackage crisscrosses this area to reach various locations on the former-Navy Shipyard piers. Photo 16 is a view to the south showing the trackage coming to a dead-end. I understand that this trackage once allowed Navy railcars to move to the piers shown on Overview Aerial H, but California Northern did not operate here (and as the photo shows the trackage is covered by stored material). The Army Reserve installed the fence that is shown in this photo in or about 2002, and it has remained as shown since that time. The Army Reserve uses the track for storage and has done so continuously for many years.

43. Photo 17 and Photo 18 show the dock-side locations used by XKT and CS Marine. Again, neither XKT nor CS Marine received any railcars at this location from California Northern. To the extent any rail cars have been in this area since the Navy's operations, they likely were pushed here by forklift.

44. Photo 19 is a view to the north of rail trackage in the Nimitz Avenue corridor. Trackage here is laid in or adjacent to the street in most locations. As with Railroad Avenue, the entirety of Nimitz Avenue will require major infrastructure improvements, which would require expansion of the street, interrupting or curtailing any

rail service. In addition, rail service would adversely affect access and parking in this area, causing significant Specific Plan and EIR issues (as is the case along railroad Avenue).

45. Photo 19 also shows the location of an easement granted to the California State Lands Commission, which spans the entire width of this corridor. California Northern has never operated here. This 100-foot easement was required as part of a settlement agreement with the California State Lands Commission. It insures that large industrial products being produced at XKT will be guaranteed access to Berth 20 to encourage the continuation of industrial development on Mare Island. Other businesses along the corridor are beneficiaries. While this has caused minor changes (such as hinged stop signs that can be folded flat with the ground), there are more significant impacts, such as installation of street lights, restrictions on parking, buildings, and fence installation. The existing tracks fall within this 100' easement, and therefore, the storage of cars would have to be restricted. This settlement agreement between the State of California, the City of Vallejo and LMI took seven years and significant resources to resolve. This easement is part of a much larger settlement, but it is a fundamental component to numerous land transfers, the environmental clean up and future development of Mare Island. This is another good example of the kinds of agreements and regulations that SFBRR has indicated an intention to disregard, having asserted that the parameters of Mare Island agreements are meaningless in the face of federal law.

46. Moving to the north along Nimitz Avenue, in the area depicted in Overview Aerial E and Overview Aerial F, the track continues in the street past old Navy industrial and warehouse buildings into the area of the Navy's historic drydock ship

repair facilities. Photo 20 is a view to the south showing trackage along Nimitz Avenue, and the location of Cooper's waterfront facility. Although it received two railcar deliveries, they were unloaded elsewhere on the Island, not here.

47. Photo 21 and Photo 22 show the tracks jogging slightly to the east (to the right in the photos) of Nimitz Avenue, entering an area that is scheduled to be leased to California Drydock (CDDS). LMI, the City, CDDS, and numerous local, state and federal agencies have been working together for more than two years to bring this business to Mare Island in a collaborative process that has already required joint applications for use permits and numerous environmental authorizations and approvals that CDDS requires in order to operate a labor-intensive ship dismantling business at Mare Island. As these photos show (along with Photo 23, which is a view of track crossing part of CDDS's parcel), movements of locomotives and railcars on the trackage in this area could be incompatible with CDDS's planned operations. One issue that is readily apparent in the photos is the fence CDDS will be required to build at this location (marked with dashed red line) in order to control access and thereby satisfy security requirements contained in its contract for dismantling of governmental ships. The rail operations proposed by SFBRR would also interfere with required on-site parking that is essential to the CDDS operation. Truck access would be hampered, and access would be impossible if SFBRR were to store railcars here. CDDS is not coming to this site with an expectation of rail service, and if rail service does become an option at this location someday, it would have to be implemented with great care and sensitivity to CDDS's operations and other uses of property in the vicinity.

48. As Overview Aerial E also depicts, the trackage in this area is in close proximity – and no doubt was put here to serve – the former-Navy drydocks. The large mobile cranes that serve these drydocks will be essential to CDDS's proposed operations. Those cranes operate on their own track system (as shown in part on Photo 23), and could not be used efficiently if railcars were stored in this area. California Northern never operated here. The Navy's operations were limited to the service of the Navy's own specific purposes, and rail cars were moved in and out in strict coordination with other activities.

49. To the north of the drydocks that CDDS will operate is the "Historic Core" of Mare Island. This portion of Nimitz Avenue is slated to become a public plaza, providing pedestrian access to the waterfront in accordance with the City-approved Specific Plan and the EIR. Photo 24 shows the existing Mare Island Museum (already open to the public) and the future site of the plaza and pedestrian access. Rail service in this area would be completely incompatible with these plans. California Northern never operated here. Attempts to explain the redevelopment plans to SFBRR have been unsuccessful. Photo 25 is a view to the south of the same location. A rendering of the planned plaza, shown from roughly the same vantage point as Photo 19, is attached hereto as Exhibit E. Any obligation to retain rail trackage (and rail operations) in this area would be a severe problem.

50. Returning to the area near A Street depicted in Overview Aerial A, trackage diverges from Railroad Avenue, briefly runs west in A Street, and then turns to the north to parallel Azuar Drive. Photo 3 shows trackage along A Street, where the track from the Causeway enters in the near right, and the track heading to the Azuar Drive

corridor departs in the far right. Along A Street at this location are several storage tracks, some of which were used by California Northern to store cars pending their delivery to other locations (such as North Pacific Lumber on Railroad Avenue). This is also where certain businesses – including Alamillo, Bio-Energy, and Latham Truss – unloaded railcars delivered by California Northern.

51. Turning north to follow Azuar Drive, Photo 4 is a view to the south where the track crosses Azuar Drive. The trackage in this area is expected to be removed in the near future to permit environmental remediation of the underlying soil, which is near the site of a former Navy crane test facility. That work will require several months, and issues with the crossing configuration may delay (or prevent) re-installation of the rail in this area.

52. In the distance of Photo 4 is an ongoing remediation project that has already required the closure of Azuar Drive for approximately six months. Previous remediation work in that vicinity required removal of large amounts of soil, which for a brief time California Northern carried from the Island by rail (for Weston Solutions, on behalf of the Navy, explaining why Weston is listed as a rail customer on Exhibit B).

53. In the future, the entire Azuar Drive corridor is slated for major reconfiguration, converting the two-lane street shown in Photo 4 into a four-lane parkway with a landscaped median divider and a multi-use pedestrian path. Exhibit F an excerpt from the Specific Plan showing the future cross-section of Azuar Drive at this location. LMI has left open the possibility of retaining rail along this corridor, subject to unresolved issues such as funding and making room for the required roadway

improvements in light of the proximity of structures, historic resources, and the protected wetlands to the west.

54. Track proceeds north along Azuar Drive to the area shown on Overview Aerial I. As I explained in my previous Statement, no rail operations to this area are possible currently because trackage has been removed to allow a Navy environmental remediation project to proceed. The location of that work is shown in Photo 26.

55. Photo 26 also shows the location of a spur that diverged and entered the building now occupied by EPS. That spur was also removed for the environmental remediation work, as shown in the photo.

56. Photo 27 shows the spur entering the old Wines Central building, where California Northern delivered cars. In the distance is the Alco facility, which California Northern also switched. Photo 28 provides a closer view of the Alco facility and the spurs that diverge into its building.

#### **California Northern's Relationship with LMI and Rail Customers on Mare Island**

57. During the time when California Northern was operating on Mare Island, there was never any question that rail operations were a tenuous – and likely temporary – service. It was understood by every stakeholder in the ongoing redevelopment of the Island that rail service at any particular point on the Island – and indeed on the Island as a whole – would be subject to interruption for any number of reasons, including its ultimate incompatibility with redevelopment objectives. I personally conducted meetings with Mare Island businesses, typically on a quarterly basis, and the future status of the railroad – and the potential that service would be curtailed by ongoing redevelopment – was frequently on the agenda. In addition, during this entire period, California Northern had



frequently expressed to me that if car volumes dropped, it would no longer be financially feasible to deliver cars to Mare Island.

58. Moreover, when businesses located on the Island, it was made clear to them that rail service might not be available in the future as the Island's redevelopment evolved. For example, when Alco and EPS purchased their facilities, LMI was explicit about the potential that there would be no rail service. In Alco's case, LMI's agreement makes clear that rail service would only be provided "for so long as Seller shall elect." (This language is quoted in Exhibit P to SFBRR's March 12 Petition.) Similarly, in early conversations with Victor Zayas of EPS, for example, the potential curtailment of rail service was discussed explicitly. Exhibit G is an email conveying a report of my LMI colleague, Cliff Miller, about a 2003 call with Mr. Zayas, in which Mr. Zayas explained that "[h]e isn't concerned if the RR is curtailed completely." (Mr. Zayas was copied on this email.)

59. For example, as LMI outlined in correspondence with the City of Vallejo in 2008, "[f]or over seven (7) years LMI has met with the tenants, California Northern and the City on numerous occasions. During these meetings, LMI has informed all parties that if solutions could not be found, the rail service would have to be discontinued." See Letter from LMI to City of Vallejo Mayor, Vice Mayor and Council members (Mar. 7, 2008) (Exhibit H hereto).

60. In 2002, only eight months after transfer, LMI wrote to all businesses that were then receiving rail service regarding the need for them to contribute to the costs of inspecting and maintaining rail trackage on the Island. The operator at the time (California Northern) had no agreement with LMI and was making no contribution to

these expenses. As LMI expressly noted in this communication (and others like it):  
“You should also be advised that the Landlord [LMI] is under no obligation to provide this service,” i.e., to make available a rail system that allows for the delivery of railcars to Mare Island businesses. LMI Memorandum to All Mare Island Railroad Users (Dec. 2, 2002) (Exhibit I hereto).

61. Beginning in 2003, it became apparent to LMI that there were serious challenges facing long-term rail service. Among them was the fact that, in order to create the rail traffic necessary (assuming that a market for such service would exist in the future) to fund the required upgrades, along with ongoing maintenance and other costs of the system, the City would have to abandon several aspects of its Reuse Plan.

62. In June 2005 LMI recommended, in the Restated Specific Plan, the City’s most detailed plan for development on the Island, that an effort to retain rail be promoted as long as a funding source could be identified. Although funding was never solidified, the City’s requirements as part of a parcelization plan submitted in 2007 rendered the point moot because the City’s requirements for rail far exceeded any reasonable financial feasibility. The result was LMI’s letter to the City Council in 2008, which is Exhibit H.

***The Decline in Rail Volumes in 2006 and the Ultimate Termination of California Northern’s Operations in 2008***

63. As noted above, the number of railcars switched on Mare Island declined dramatically in 2006 (if that word can be used in the context of volumes that were so low in the first place). The reason was the exit of the two largest users of rail service – North Pacific and Wines Central.

64. SFBRR has suggested that charges that LMI imposed on rail users when California Northern operated on the Island led to the drop in rail service. *See* SFBRR March 24 Rebuttal, ¶ 5. SFBRR's statements are incorrect. Traffic declines led to higher per-car charges, not the other way around.

65. LMI imposed a charge on businesses using rail service to recover a portion of LMI's own out-of-pocket costs for maintenance and inspection of the trackage on Mare Island. This charge was necessary because LMI never had any agreement with California Northern providing for financial responsibility for maintenance by California Northern, or otherwise providing compensation to LMI for SFBRR's use of LMI's track.

66. LMI performed needed maintenance and inspection at its own expense and sought reimbursement on a pro-rata basis from the businesses to which California Northern switched railcars. LMI never collected more than 90 percent of its actual out-of-pocket costs, and that percentage declined significantly when traffic levels fell in 2006 and 2007.

67. LMI calculated the amount of that charge based on its actual out-of-pocket costs for inspection and maintenance with no insurance, overhead, administrative fee or mark-up of any kind, divided by the number of railcars delivered to Mare Island businesses.

68. In 2004 and 2005, when traffic was at its peak, that charge amounted to only about \$25 per car. After traffic declined in 2006 and 2007, the per-car charge necessarily increased, because LMI's expenses did not drop significantly. The per-car apportionment of these costs never exceeded \$199 per car. From 2002 to 2008, LMI never came close to recovering all of its rail-related out-of-pocket costs.

69. Even with the drop in rail traffic in 2006, LMI was prepared to continue subsidizing the maintenance and repair of rail trackage, but it also faced comparatively huge obligations relating to the need to accommodate rail with future infrastructure needs (of which the rebuilding of Railroad Avenue and Azuar Drive were just two examples – similar work would also be needed on Nimitz Avenue, along with additional complexities associated with cross-streets, cross-utilities, access, parking, pedestrian and bicycle crossings, and myriad other issues). The Railroad Avenue project is outlined in my Exhibit C. Another illustration of the kinds of infrastructure needs that were triggered by continued provision of rail service on Mare Island is the attached letter from the California Public Utilities Commission, dated April 25, 2007, which outlined myriad grade crossings improvements that the PUC would require for “rail safety” purposes in the Azuar Drive, Railroad Avenue, A Street, and other rail corridors on the Island. *See* Exhibit J hereto.

70. In light of the dramatically lower volumes – again, fewer than two cars per week – combined with the City’s requirements, LMI concluded in late 2007 that traffic levels did not justify the costs associated with maintaining rail service. Faced with this declining volume and high cost scenario, California Northern’s operations were terminated. LMI’s notice to rail customers announcing that it had decided to end rail operations on Mare Island – one example of which is the attached letter sent to Alamillo Steel in January 2008 (attached as Exhibit K hereto) – laid out this reasoning.

71. California Northern’s operations on Mare Island ceased at the end of March 2008. California Northern did not object to LMI’s notice that rail service would be terminated, and it did not seek Board authority when it ceased operating on Mare

Island. To the contrary, California Northern specifically informed LMI that its operations on Mare Island were those of a “switching carrier,” that California Northern had not “held itself out to be a common carrier for service on Mare Island,” and that its operations were “not common carrier operations” As a result, it advised LMI that it did not “require authority from the [Surface Transportation Board] to terminate those operations.” It closed by saying that it would “cease operations in time for all cars on Mare Island to be removed by March 31, 2008.” That in fact happened. This letter was attached as Exhibit 2 to my March 22 Verified Statement in this proceeding, and for convenience it is also Exhibit L hereto.

72. After California Northern left the Island, many of the rail shipments it had been delivering to businesses on Mare Island were delivered instead to other nearby locations, including a transload facility located in American Canyon, California, which is about ten miles north of Mare Island on the same California Northern line that serves Flosden Acres in Vallejo.

### **Recent Developments**

73. In my previous statements I have addressed the steps LMI has taken and continues to take to make rail service an option for businesses on Mare Island, if it can be accomplished in a way that is compatible with the ongoing redevelopment of the Island.

74. I have also explained the efforts LMI went to in late 2009 and early 2010 to determine whether SFBRR’s demands to operate on the Island might be advantageous for all of the pertinent stakeholders, including LMI, the roughly 80 Mare Island businesses, the residents and the thousands of people who come to Mare Island everyday. Unfortunately, after extensive discussions with Mr. Gavrich of SFBRR, including

discussions facilitated by the City of Vallejo, we concluded that SFBRR was unwilling to be a cooperative participant in the redevelopment of Mare Island, and so we made other arrangements for switching service on the Island. (SFBRR still has not been willing to deliver cars to the west end of the Causeway for further switching on the Island.)

75. SFBRR's submission to the Board make it even clearer to LMI that SFBRR cannot play a productive role in the redevelopment of Mare Island and the potential return of rail service to Mare Island businesses. SFBRR's Petition contains numerous distortions and misrepresentations of the facts. In particular, SFBRR distorts LMI's efforts to assure itself that any operations by SFBRR would be compatible with redevelopment, and instead accuses LMI of seeking to prevent any and all rail service. That is simply not so, as evidenced by the efforts LMI went to for many years to preserve rail service as an option. LMI in fact spent a great deal of time negotiating in good faith with SFBRR over the terms of potential access to Mare Island that LMI felt were most important to avoid conflict with ongoing development. As an example, the first draft of the license agreement put forth by LMI did contain a prohibition against transloading, because Mr. Gavrich had earlier indicated that transloading was not part of his plan. In subsequent discussions, LMI never said there could be no transloading, but we did make clear that we needed to be able to place reasonable limits on when and where that activity could occur. Despite SFBRR's initial indifference on the transloading issue, it later decided it had to have complete freedom to do whatever it wished anywhere on the Island, then refused to discuss the issue further.

76. The problem is simple: SFBRR is unwilling to be flexible. It insists on first grabbing power as a federally authorized common carrier and then wielding it on

Mare Island to suit its own interests without regard to those of the many stakeholders in Mare Island's ongoing redevelopment. While SFBRR has only one stakeholder, itself, LMI has obligations to hundreds of stakeholders, and numerous agreements relating to Mare Island redevelopment that it has signed over the last 12 years and must live up to.

77. SFBRR insists on being an adversary rather than a potential partner. As was set forth by both the City and LMI on March 22, 2010, long term rail service on Mare Island is a real possibility once redevelopment has been completed. However, the reality of former military base closure and conversion requires that, for many years, all interested parties must work together, and in some cases, compromise. LMI has resolved many, if not all, issues to date with numerous governmental agencies, private parties, community interests and other stakeholders on Mare Island. Mare Island is widely regarded as one of the most complex and challenging base conversions in the United States. On each issue, each interested party has taken the time to understand the development program and demonstrate flexibility, including the U.S. Navy, the U.S. Department of the Interior, the U.S. Environmental Protection Agency, the U.S Army Corp of Engineers, the U.S Department of Housing and Urban Development and many agencies of the State of California. In contrast, SFBRR has shown a remarkable resistance to understanding the project, and it continues to misrepresent salient facts and be completely inflexible. As a result, LMI had no alternative but to seek alternative service with MIRS. I ask that the Board not give SFBRR the ability to force itself into the middle of this vitally important and delicate project, and instead allow the Mare Island stakeholders to continue working together cooperatively so that rail service on

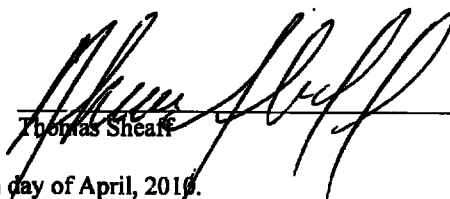
**Mare Island can be arranged in a manner consistent with 18 years of planning and progress by the Vallejo community and Mare Island stakeholders.**



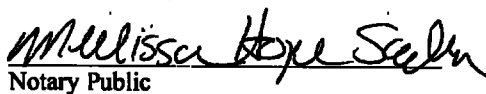
VERIFICATION

State of California )  
)  
) SS  
)  
County of Solano )

Thomas Sheaff, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted therein are true and that the same are true as stated.

  
Thomas Sheaff

Subscribed and sworn to before me this 5th day of April, 2010.

  
Notary Public

Notary Public of California

My Commission expires: July 19 2010



**Exhibit A to April 5, 2010  
Verified Statement of Thomas Sheaff**

# **Photographic Tour of Rail Trackage on Mare Island**

**Exhibit A to April 5, 2010  
Verified Statement of Tom  
Sheaff**

# Key for Aerials and Photographs

Rail trackage marked by  
SFBRR on Exhibit C to its  
Petition:



**Trackage that California  
Northern used**



**Trackage that California  
Northern did not use**



**Photo locations and direction**



**Streets**



**Former (or present) rail  
customers**

**VA Clinic**

**Other points of note**



**Selected Property Line  
Boundaries**

# Index to Photographs

<b>Photo Location</b>	<b>Subject</b>	<b>Overview Aerial(s)</b>
<b>1</b>	Transition from Causeway onto Mare Island	<b>A</b>
<b>2</b>	Alstom facility and 300-yard spur trackage	<b>A</b>
<b>3</b>	View to west of trackage in A Street Corridor	<b>A, B</b>
<b>4</b>	View to south along Azuar Drive showing location of trackage to be removed for environmental remediation	<b>A</b>
<b>5</b>	View to north of former North Pacific Lumber and former Latham Truss (now Alamillo Building 507) facilities on Railroad Avenue	<b>B</b>
<b>6</b>	VA Clinic – showing relation to street trackage on Railroad Avenue	<b>B, C</b>
<b>7</b>	MuriGenics – showing relation to street trackage on Railroad Avenue	<b>B, C</b>
<b>8</b>	Building 1310 – showing relation to street trackage on Railroad Avenue	<b>E, F</b>
<b>9</b>	View to south of track on Railroad Avenue between XKT and Jeffco, and switch beyond which California Northern could not pass	<b>E, F</b>
<b>10</b>	Trackage in XKT yard	<b>F</b>
<b>11</b>	Trackage in XKT yard	<b>F</b>
<b>12</b>	Trackage in XKT yard	<b>F, G</b>
<b>13</b>	Trackage passing Jeffco facility	<b>F, G</b>
<b>14</b>	Trackage passing Jeffco facility	<b>F, G</b>
<b>15</b>	Trackage entering XKT yard from Railroad Avenue	<b>F, G</b>
<b>16</b>	View to south towards former Navy piers and Army Reserve	<b>G, H</b>
<b>17</b>	View of trackage towards CS Marine	<b>G, H</b>
<b>18</b>	XKT and CS Marine facilities on piers	<b>G, H</b>
<b>19</b>	View north along Nimitz Avenue showing 100-foot State Lands Commission easement	<b>G</b>
<b>20</b>	Trackage in Nimitz Avenue passing Cooper facility	<b>E, F</b>
<b>21</b>	View north along Nimitz Avenue showing location of future California Drydock (CDDS) facility	<b>E, F</b>
<b>22</b>	View of future CDDS facility	<b>E, F</b>
<b>23</b>	View of future location of CDDS facility and relation to rail trackage	<b>D, E, F</b>
<b>24</b>	Location of future public plaza and waterfront access in Historic Core Area	<b>D, E</b>
<b>25</b>	View south along Nimitz Avenue in vicinity of Historic Core	<b>D, E</b>
<b>26</b>	View south along Azuar Avenue showing location of trackage removed for environmental remediation project, including former spur into EPS building	<b>I</b>
<b>27</b>	View of trackage at former Wines Central facility, including spur entering building	<b>I</b>
<b>28</b>	View of trackage at Alco facility, including spur entering building	<b>I</b>

Overview Satellite Map of  
Rail Trackage on Mare Island  
(tracking SFBRR Exhibit C Map)

former Wines Central  
(now EPS)

EPS

Overview Aerial I

Azuar Drive

Walnut Avenue

Railroad Avenue

LMI Property

City Property

G Street

Overview Aerial A

Alstom

A Street

former  
North Pacific

former Latham Truss  
(now Alamillo)

Overview Aerial B

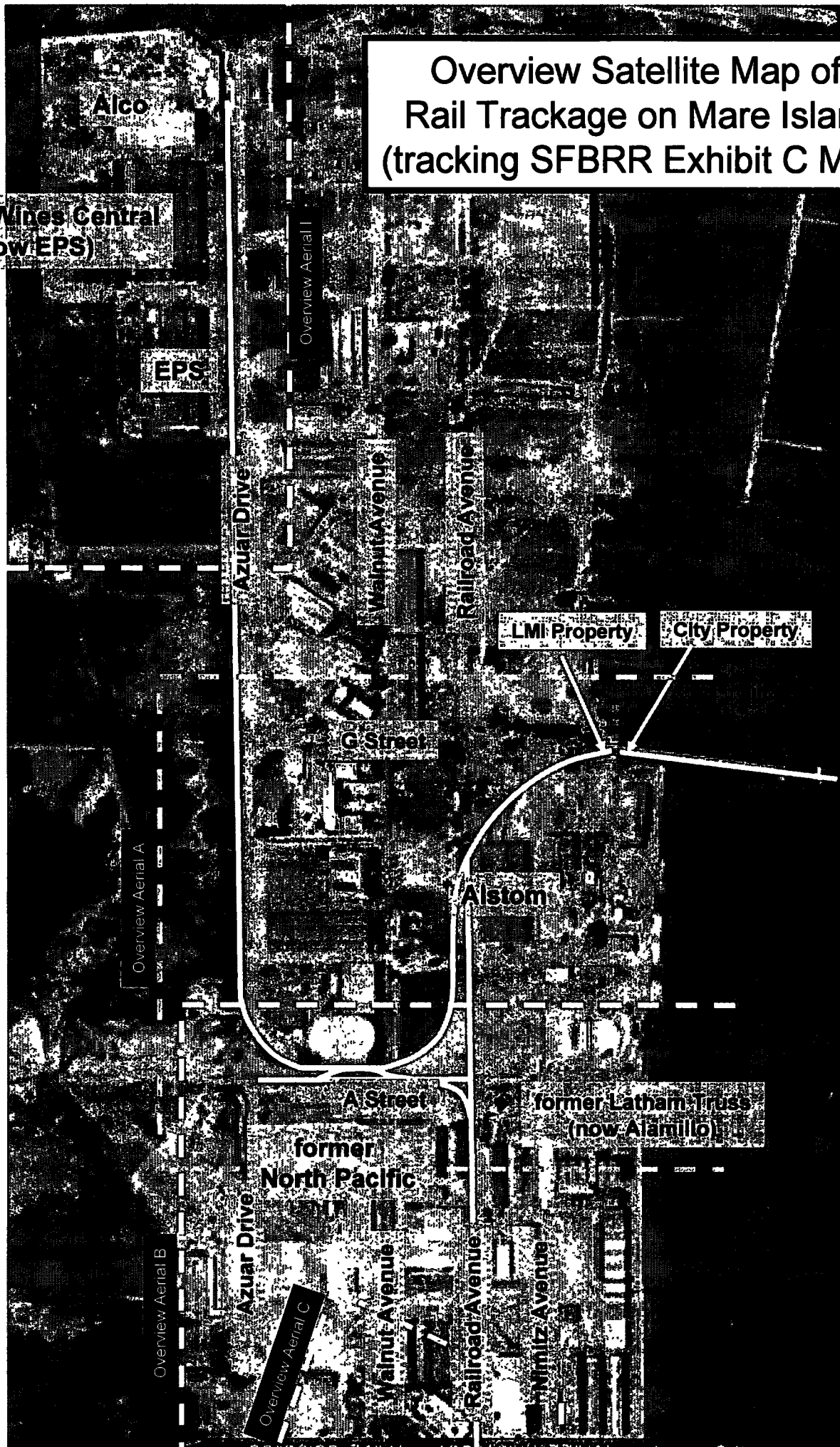
Azuar Drive

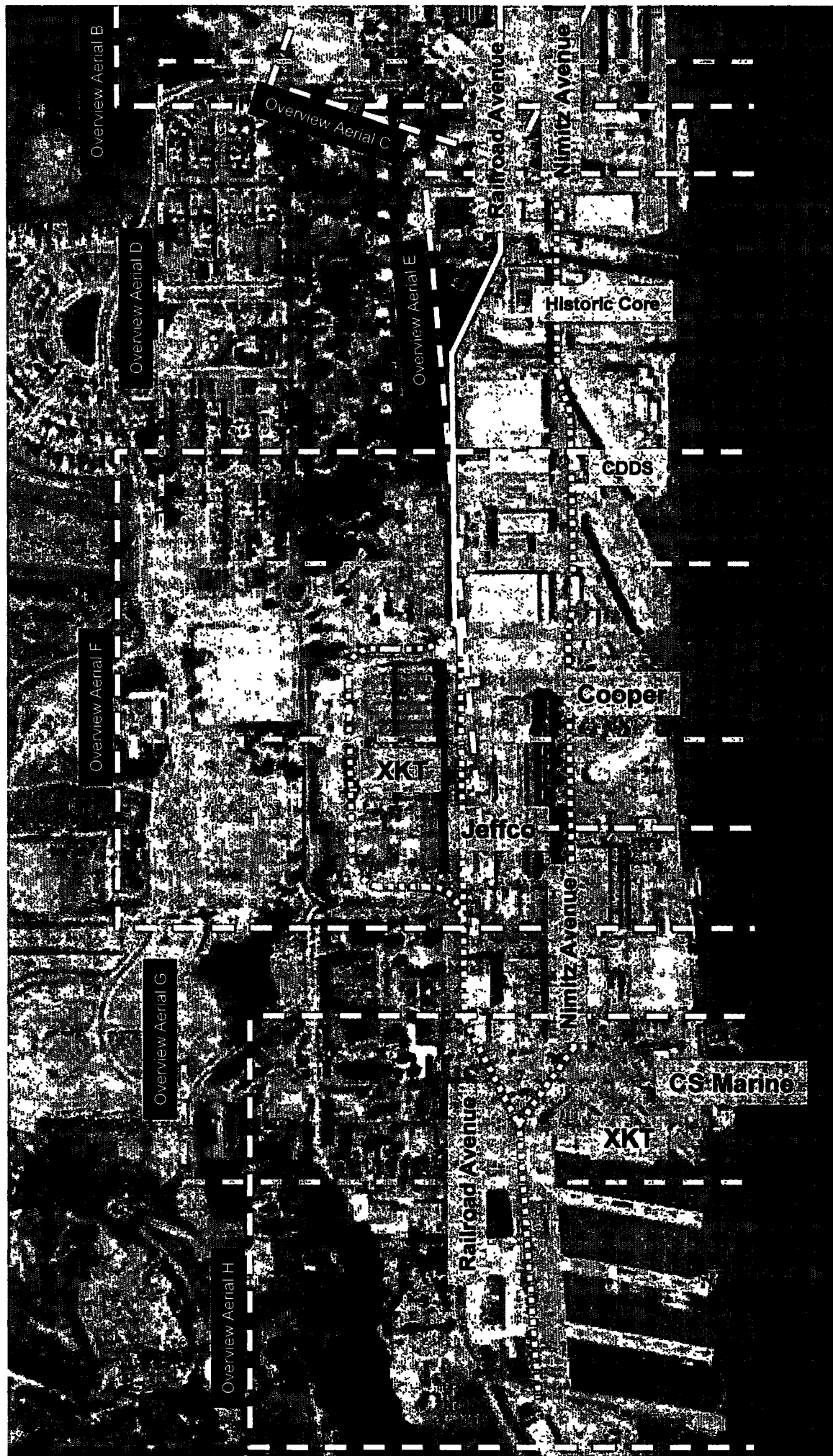
Walnut Avenue

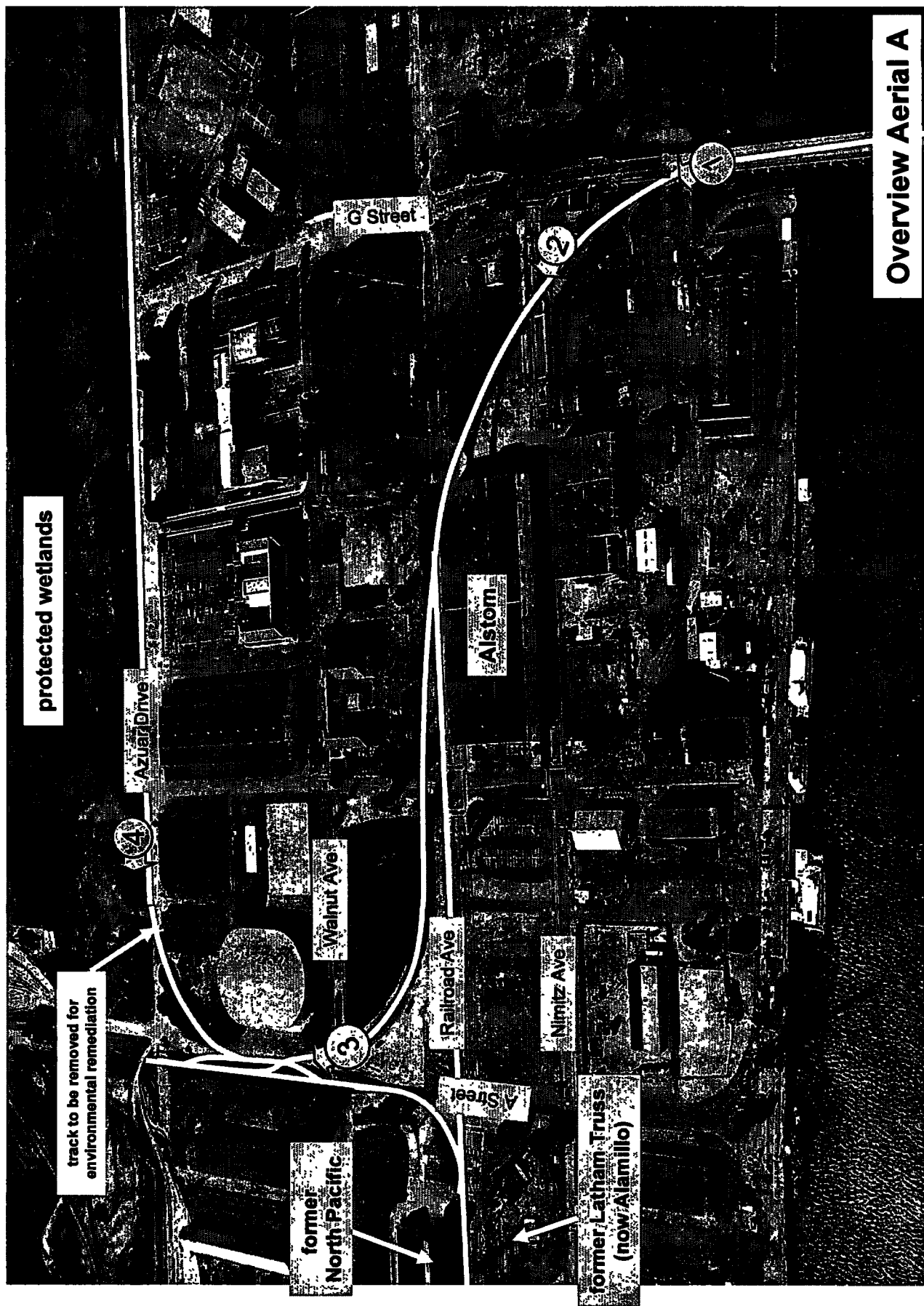
Railroad Avenue

Nimitz Avenue

Overview Aerial C

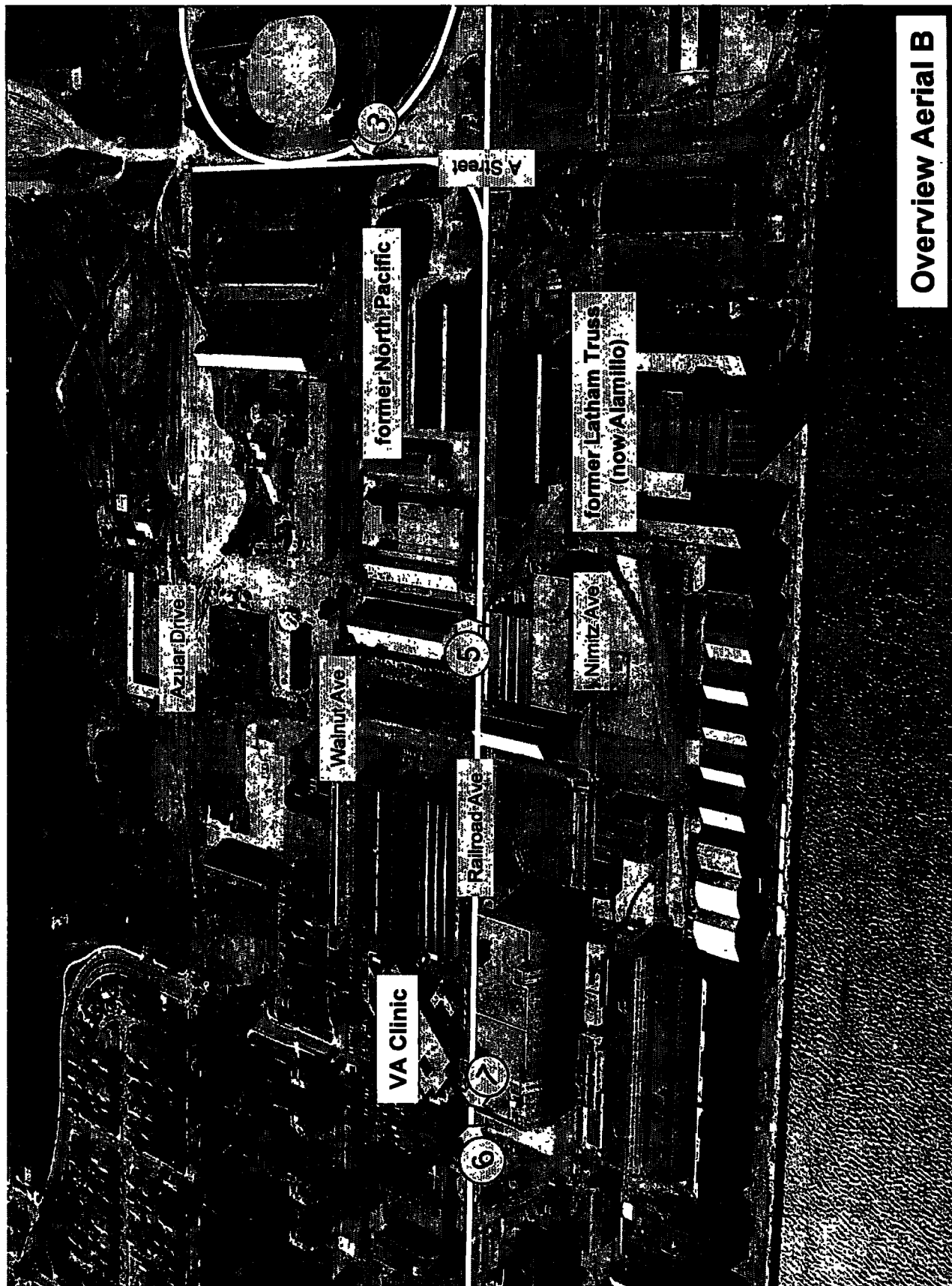




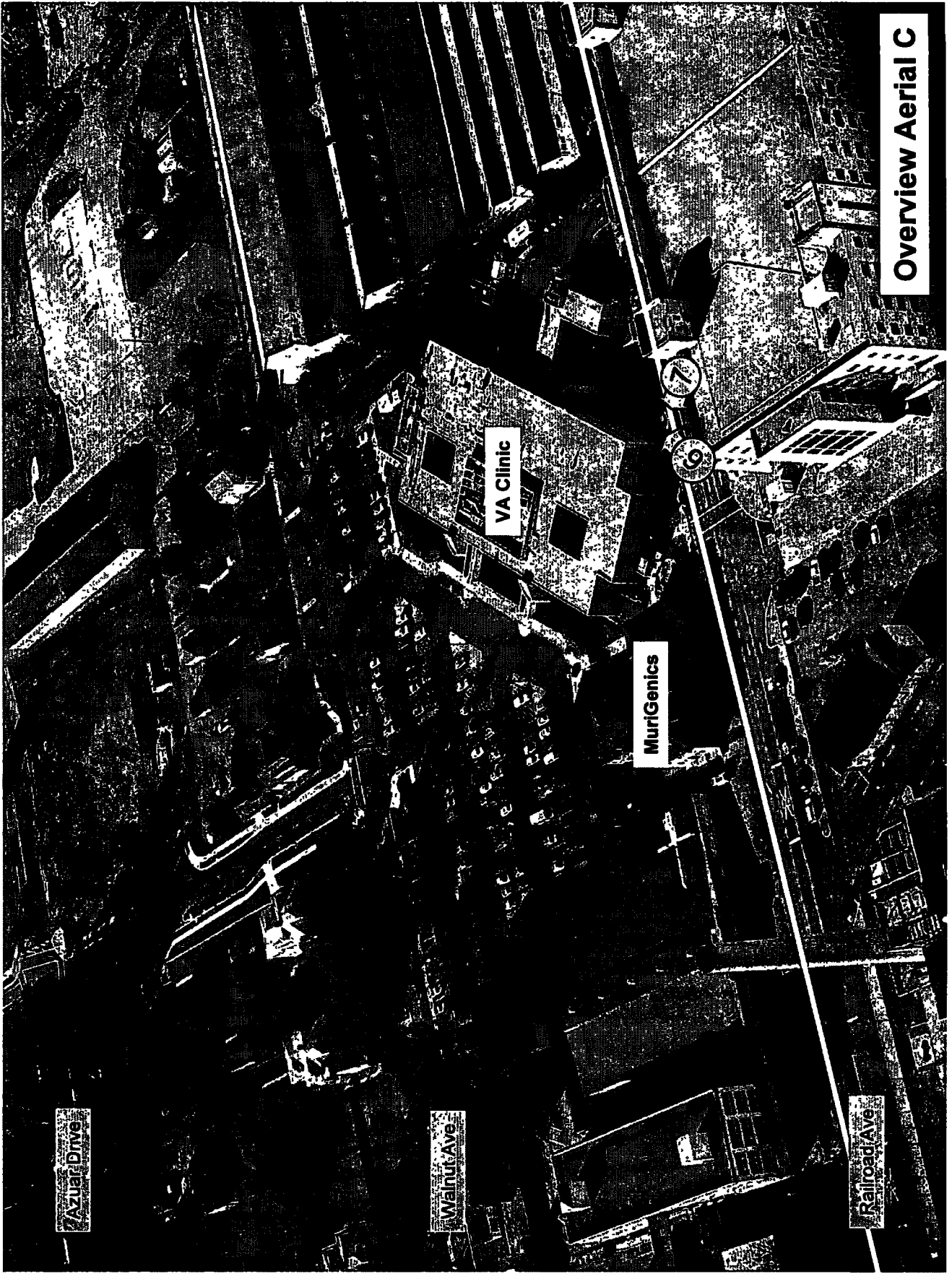


Overview Aerial A

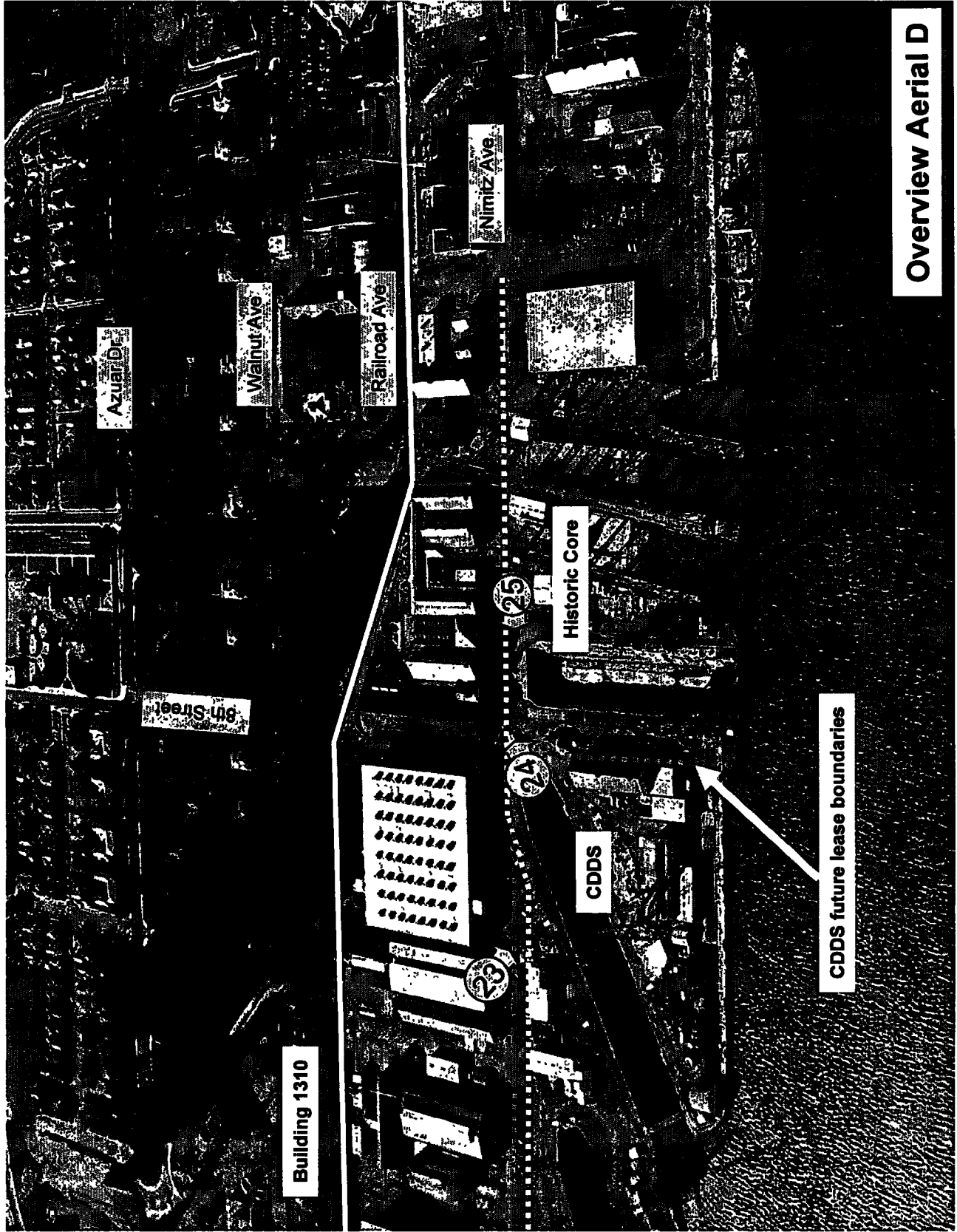




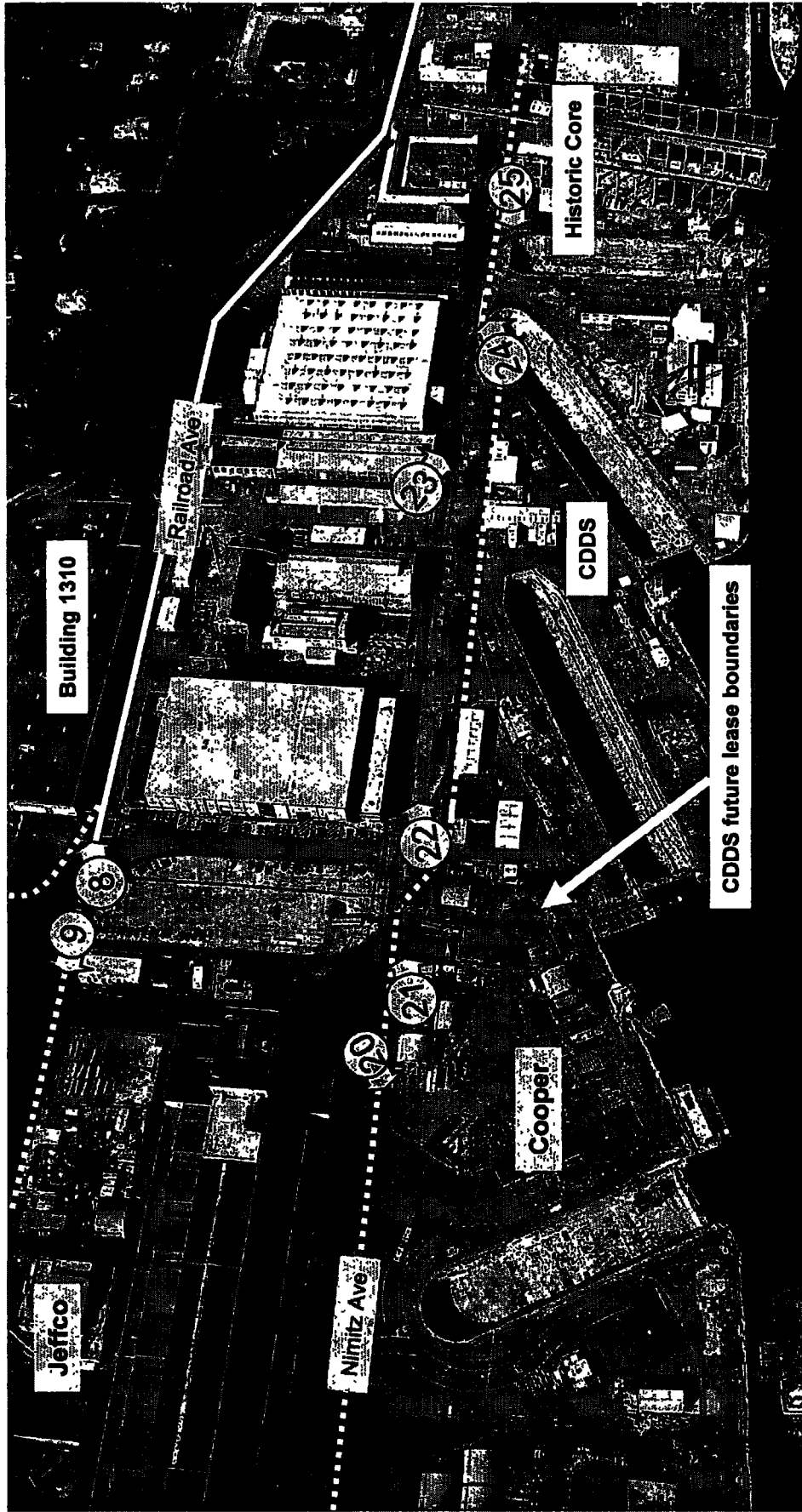
Overview Aerial B



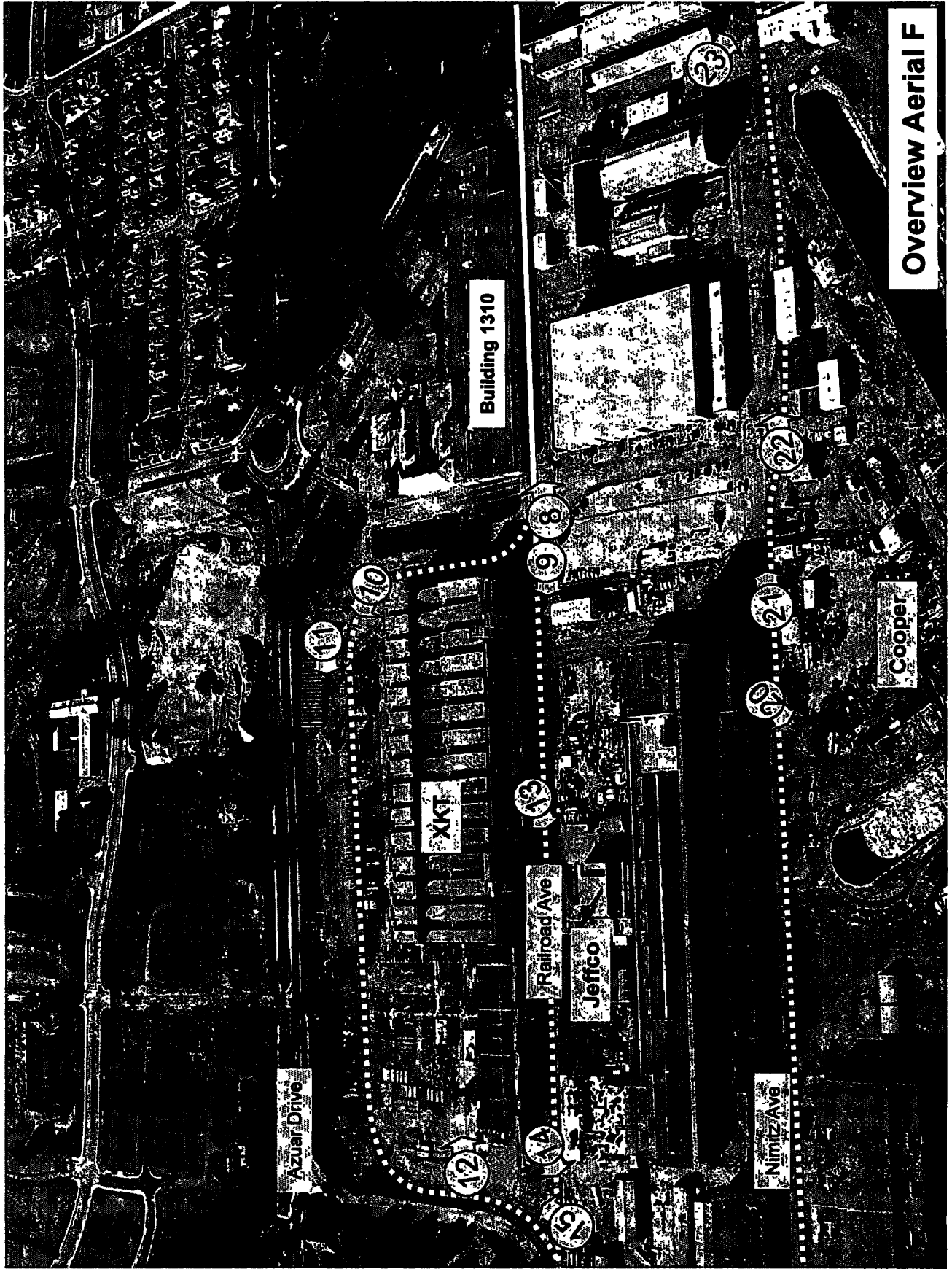
Overview Aerial C



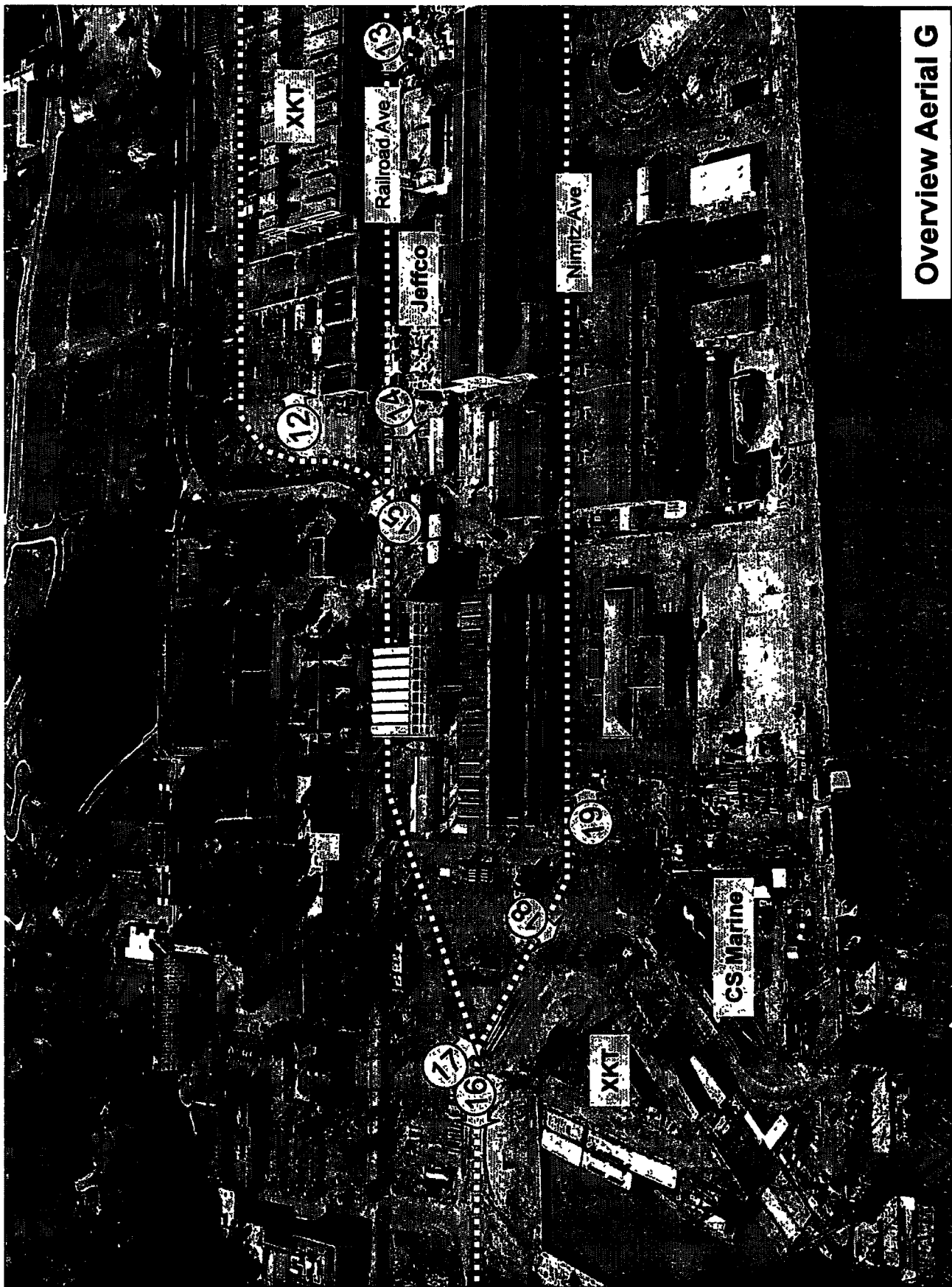
Overview Aerial D



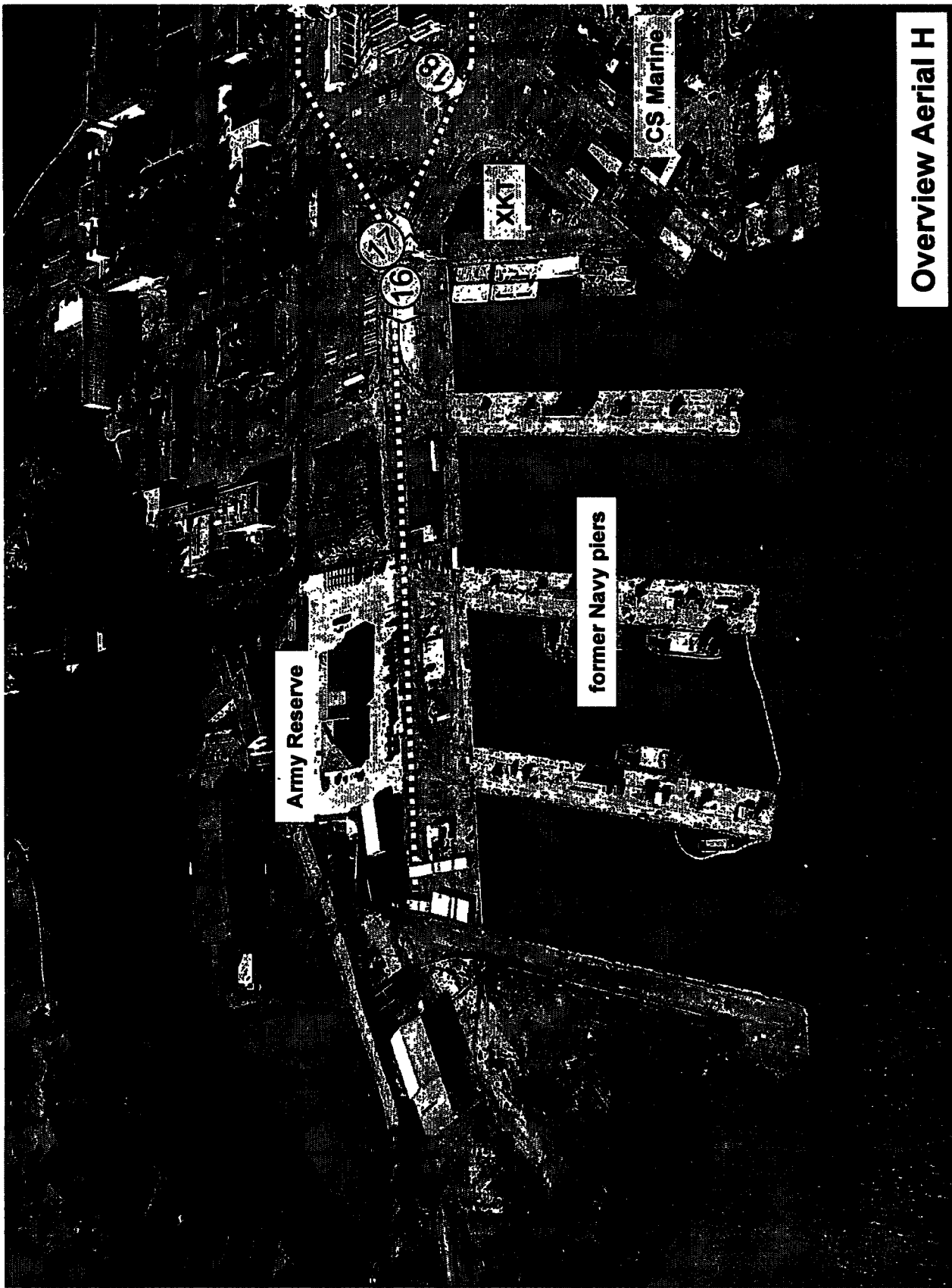
# Overview Aerial E



Overview Aerial F



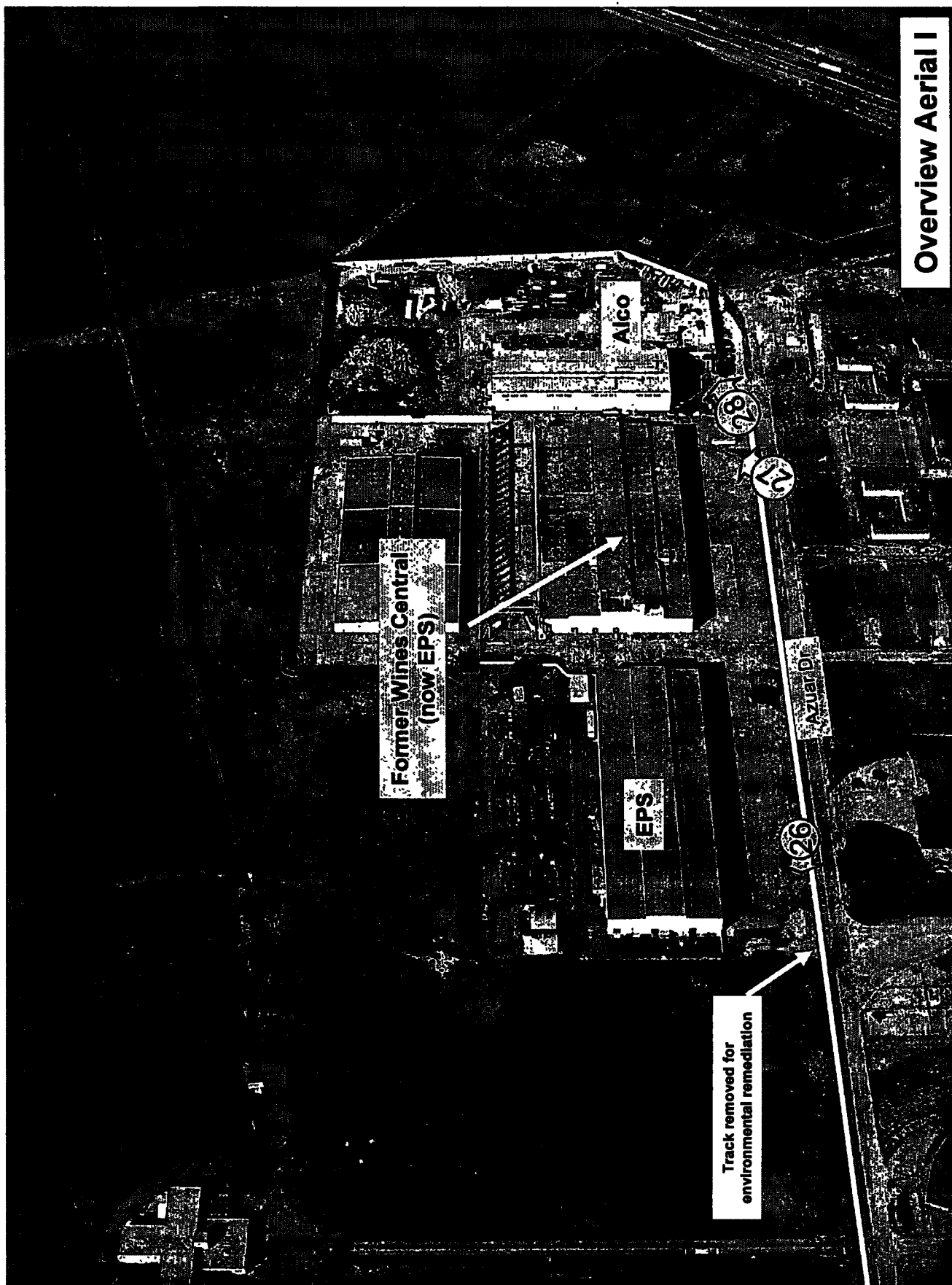
Overview Aerial G



Overview Aerial H



Overview Aerial I





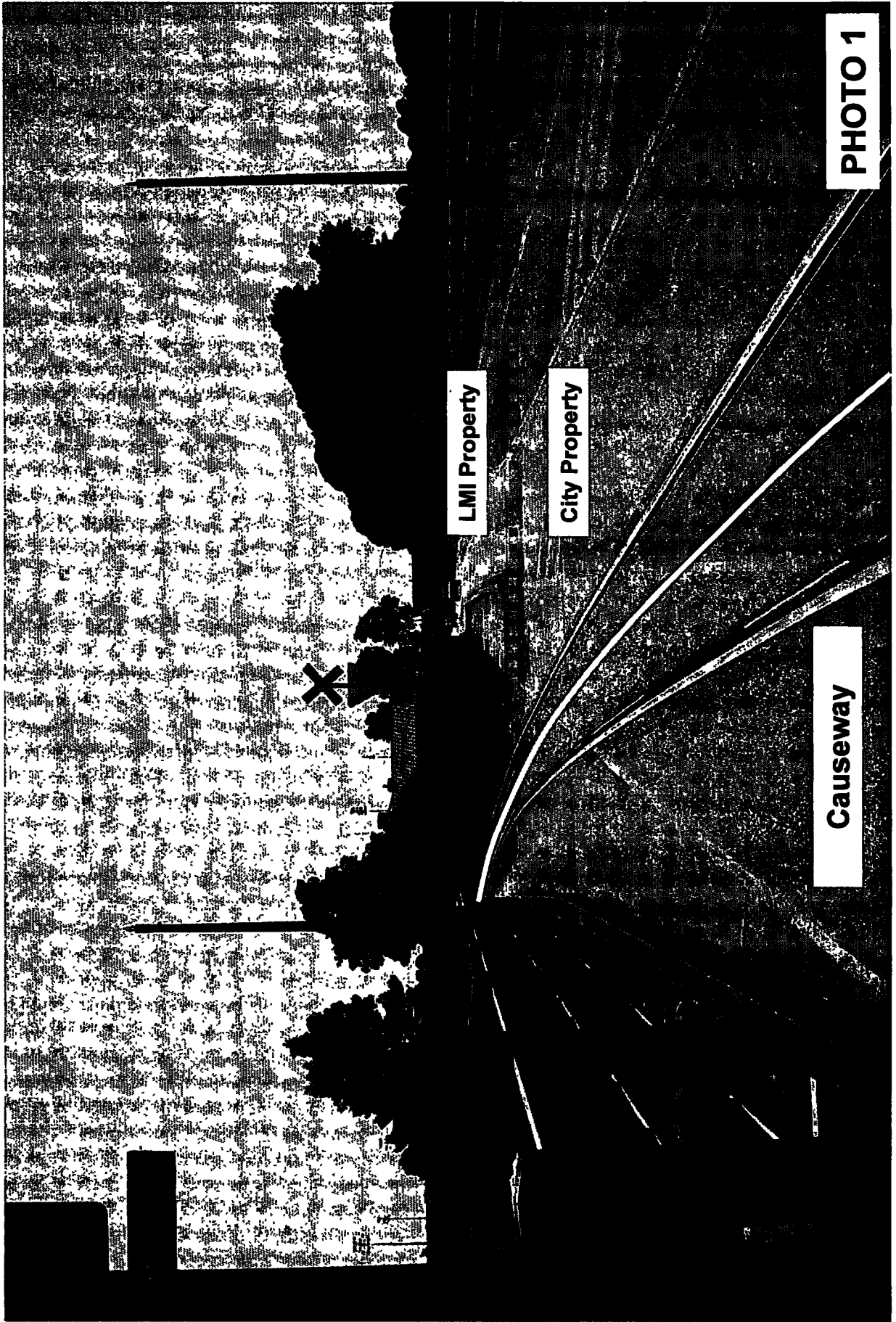
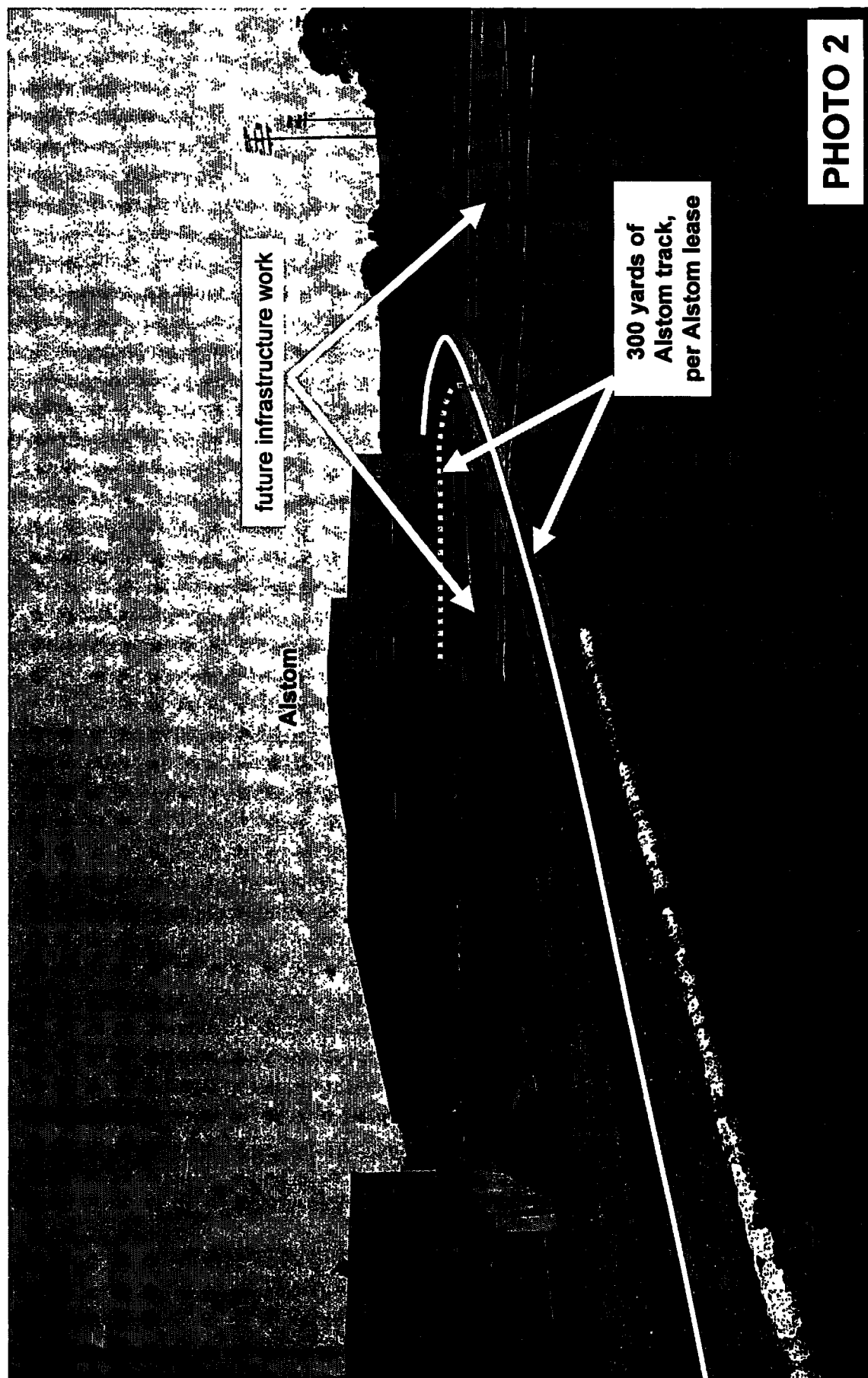


PHOTO 1

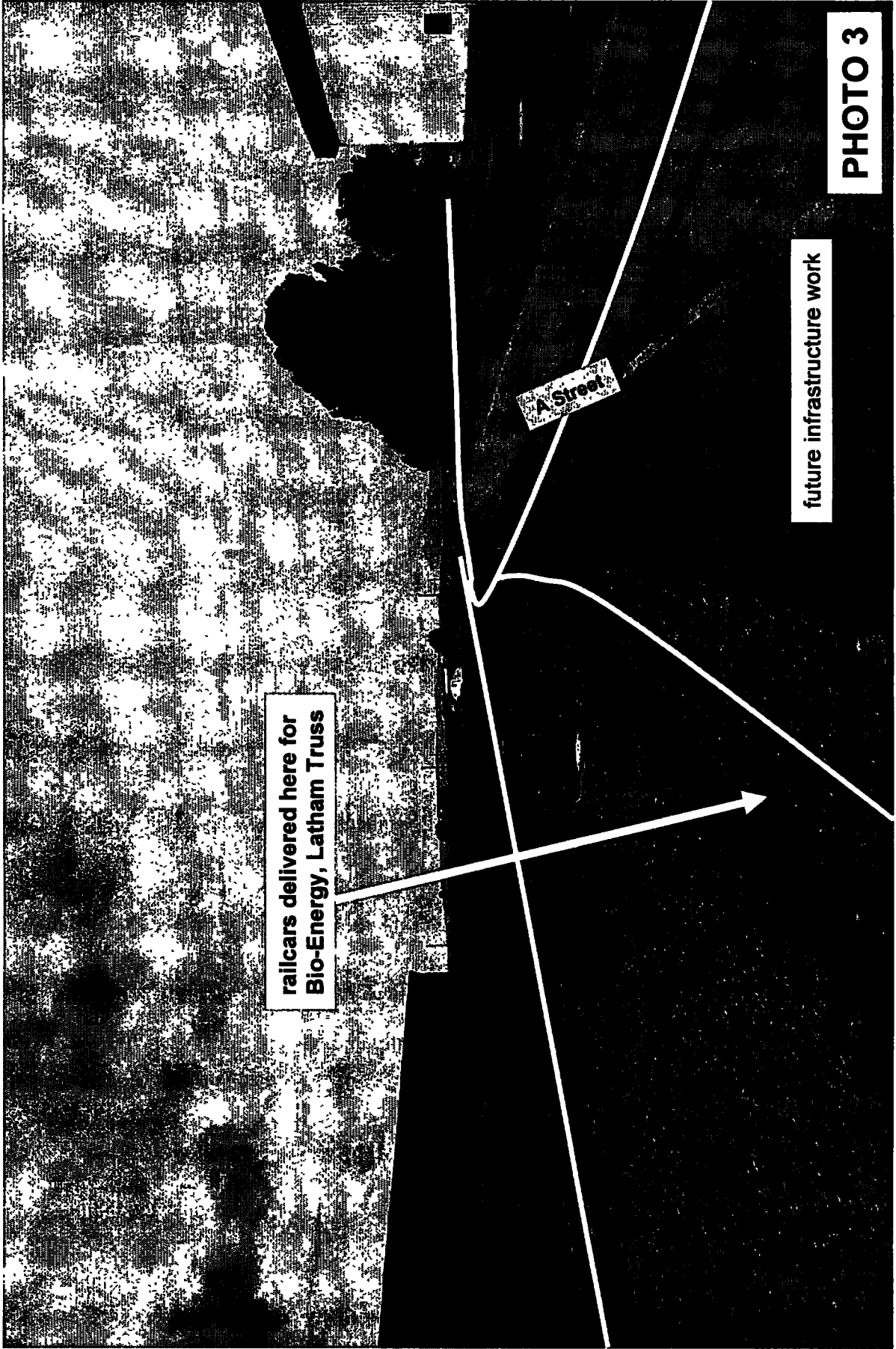
LMI Property

City Property

Causeway



**PHOTO 2**

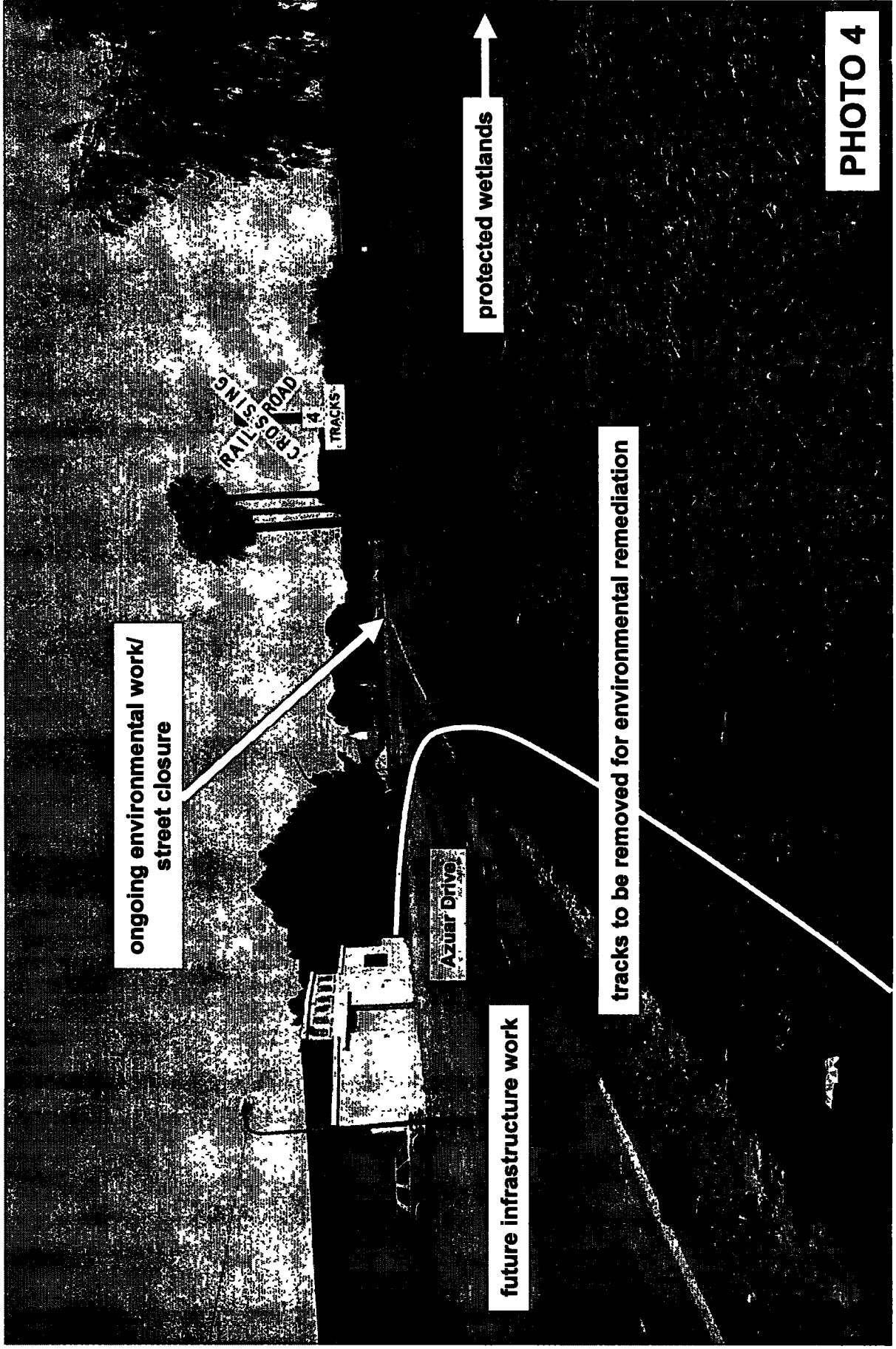


railcars delivered here for  
Bio-Energy, Latham Truss

A Street

future infrastructure work

PHOTO 3



**PHOTO 4**

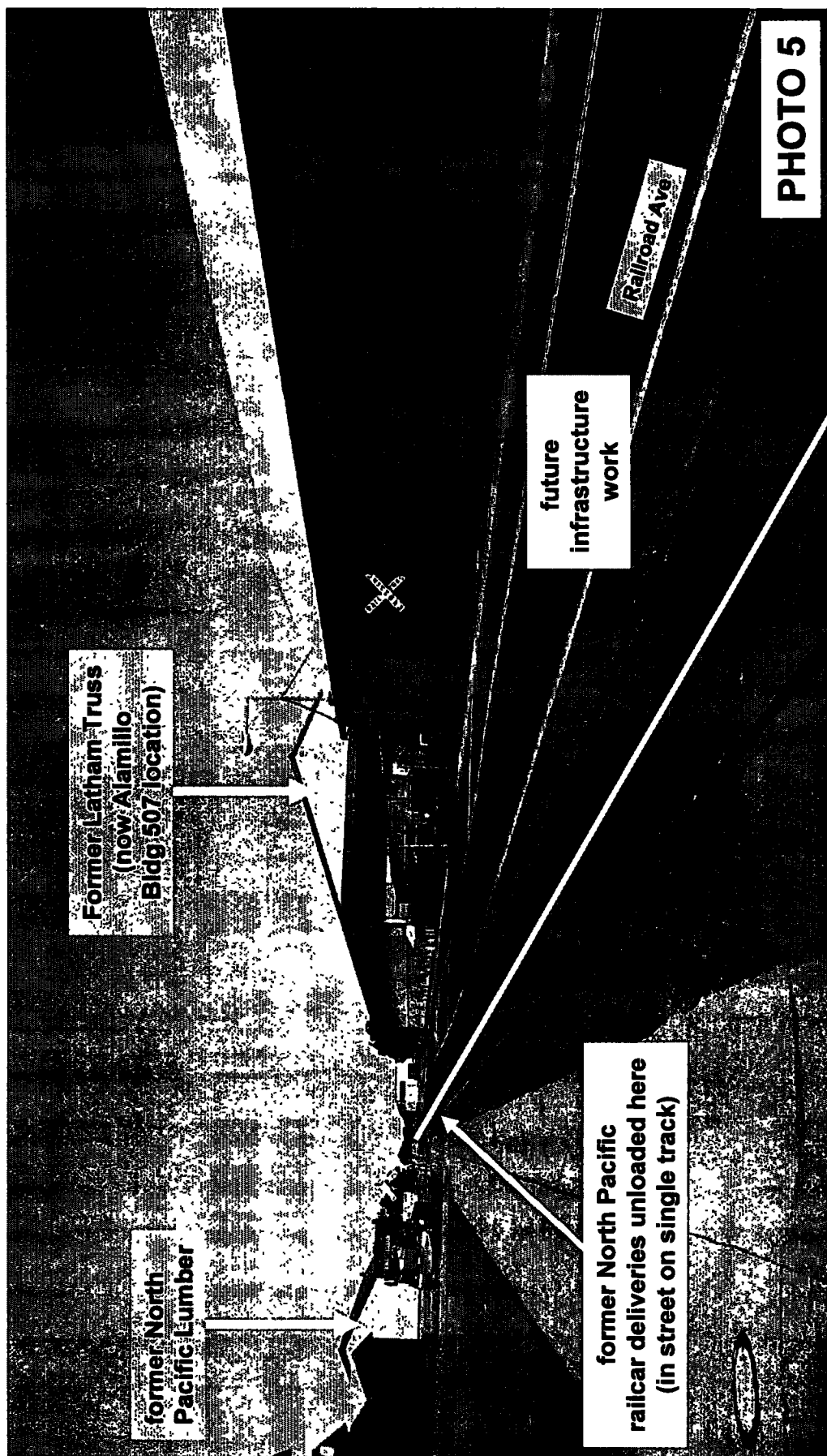


PHOTO 5

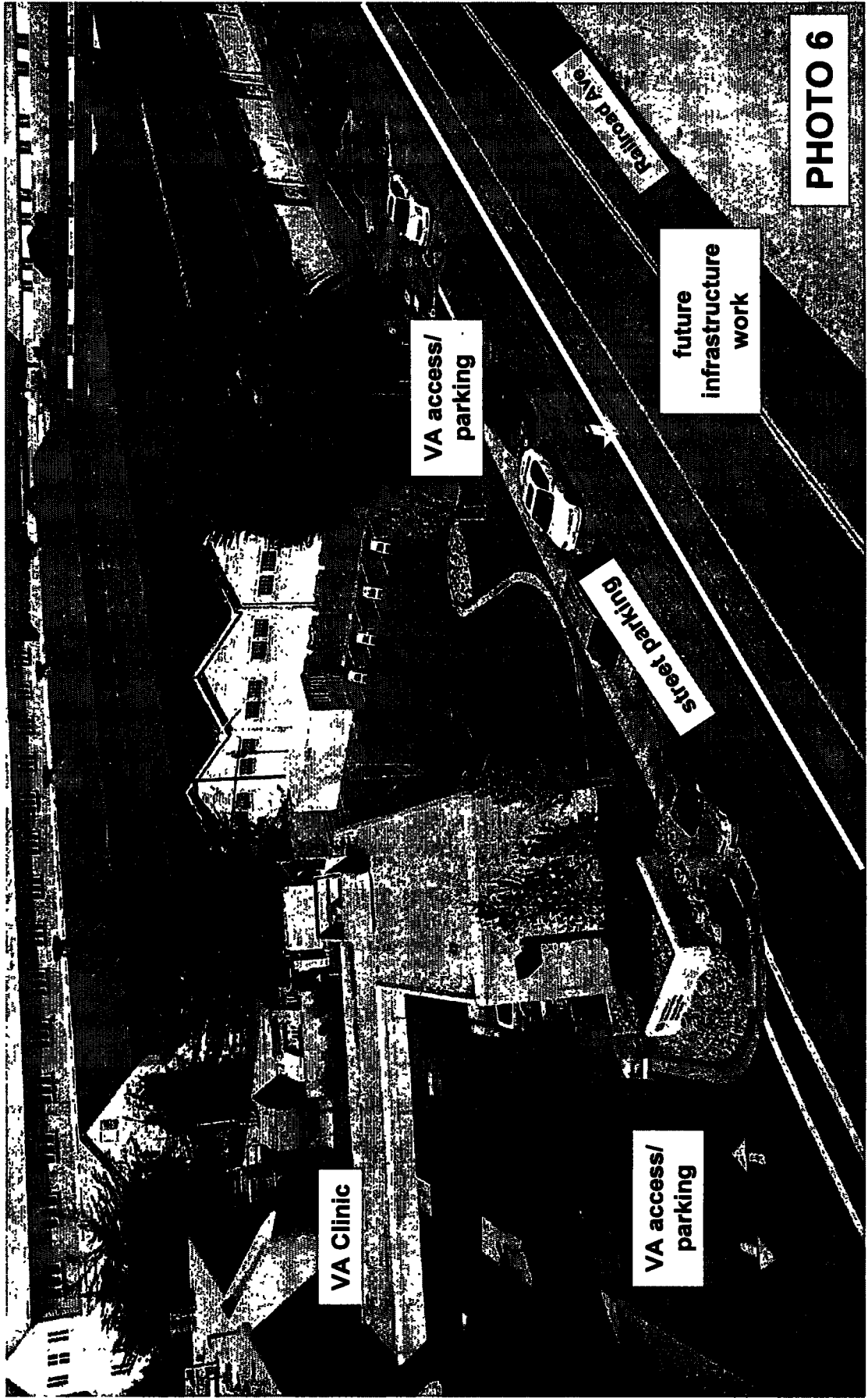
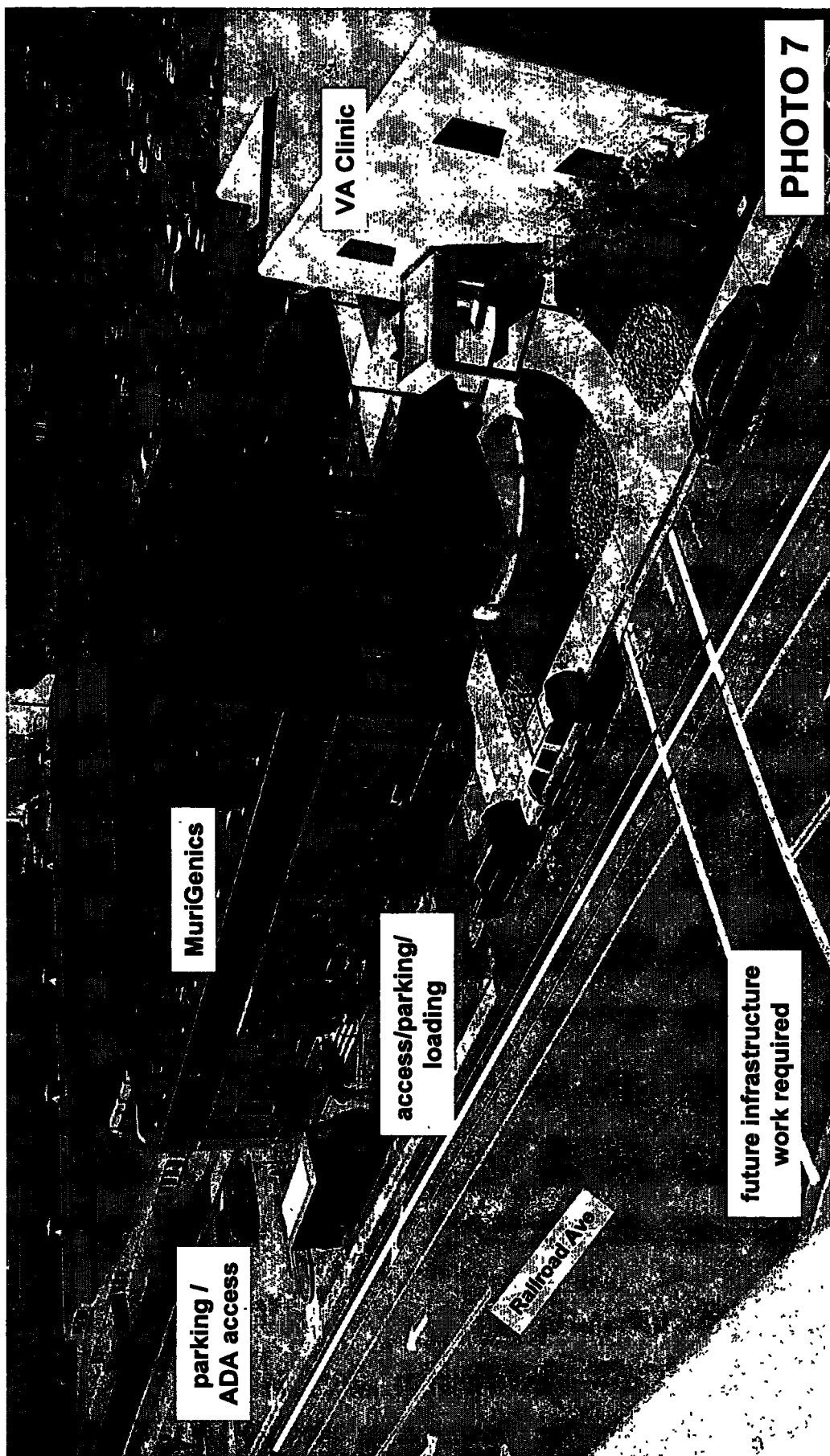


PHOTO 6



MuriGenics

parking /  
ADA access

access/parking/  
loading

VA Clinic

Railroad Ave

future infrastructure  
work required

PHOTO 7



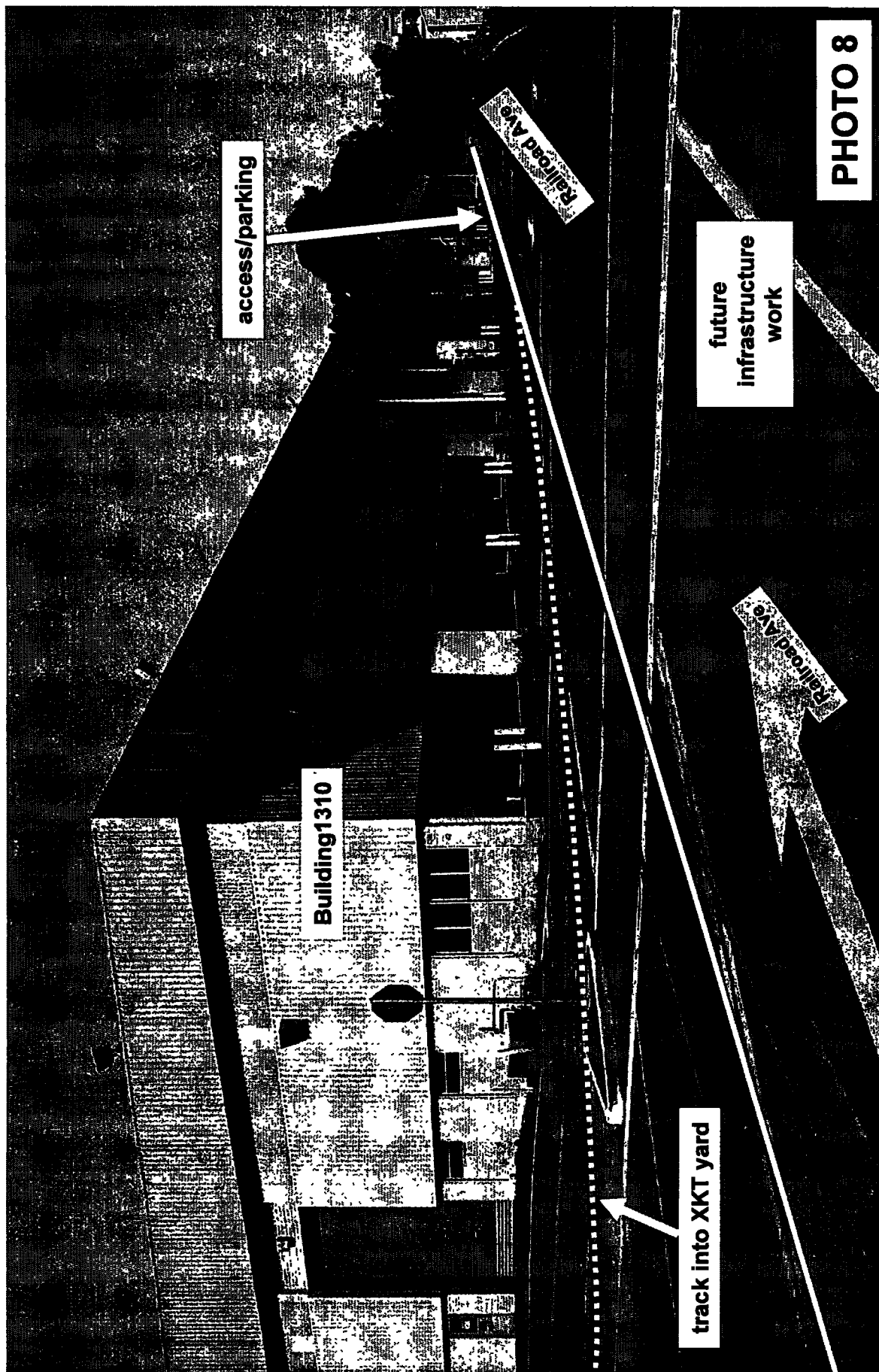


PHOTO 8



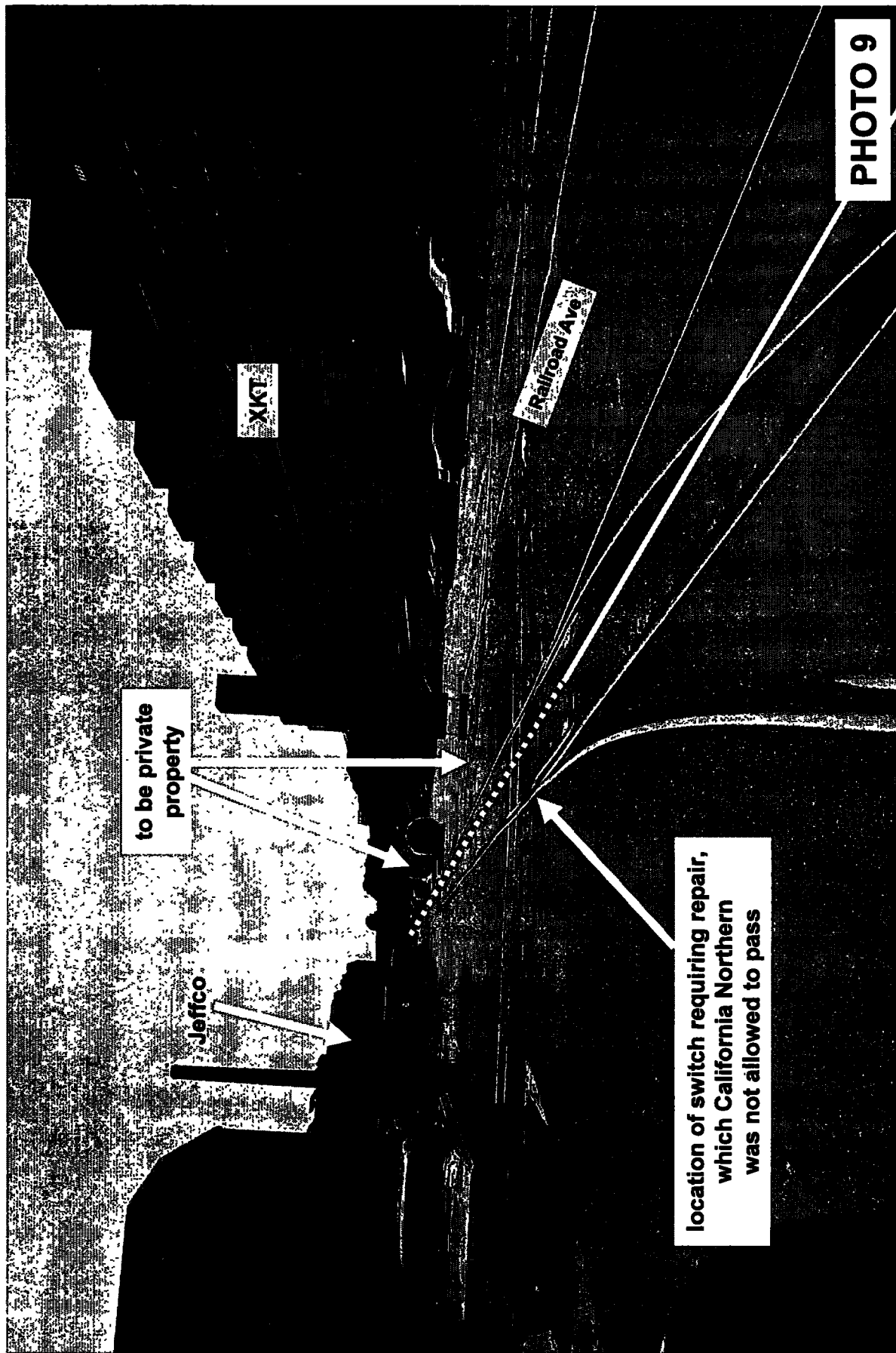
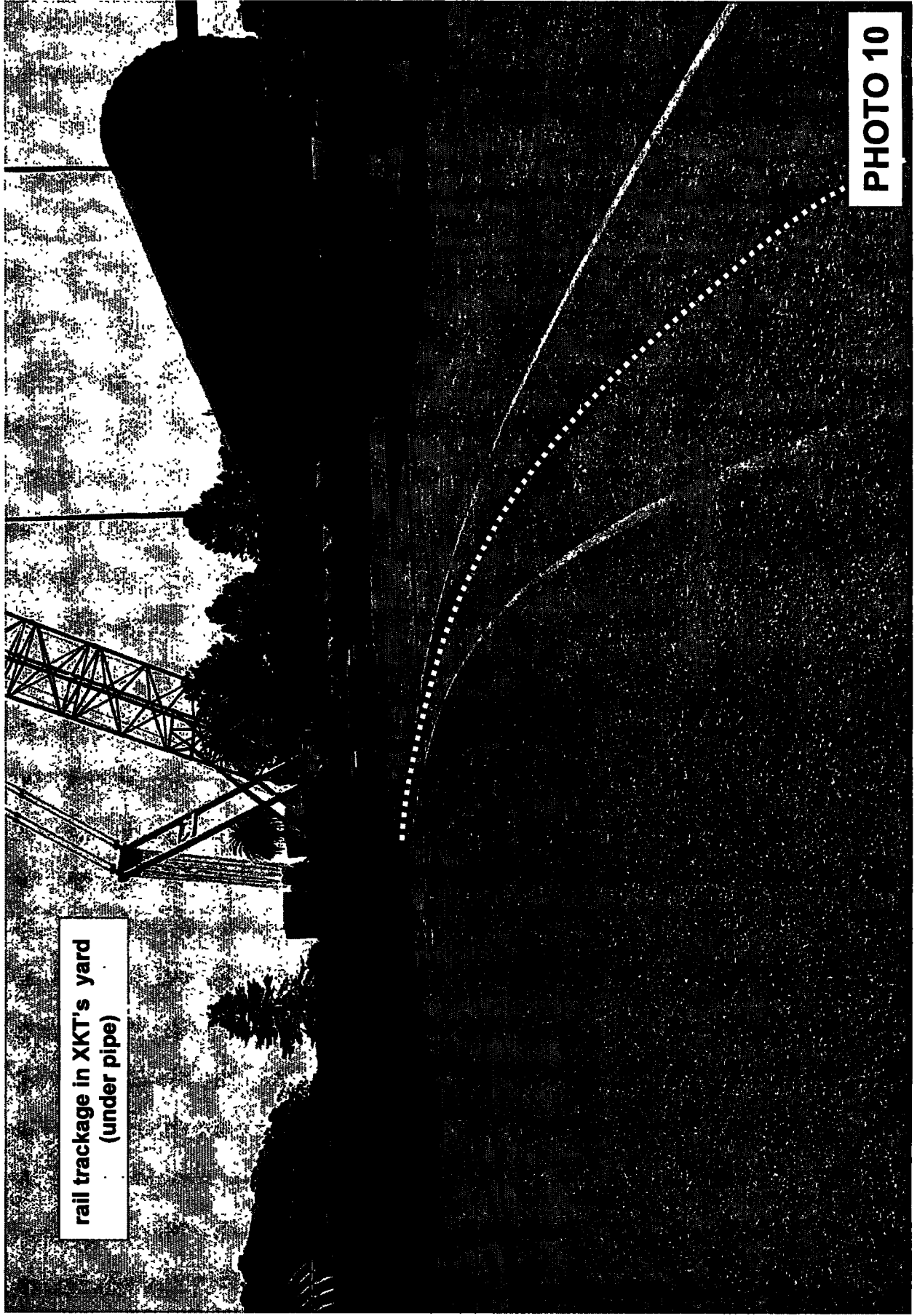


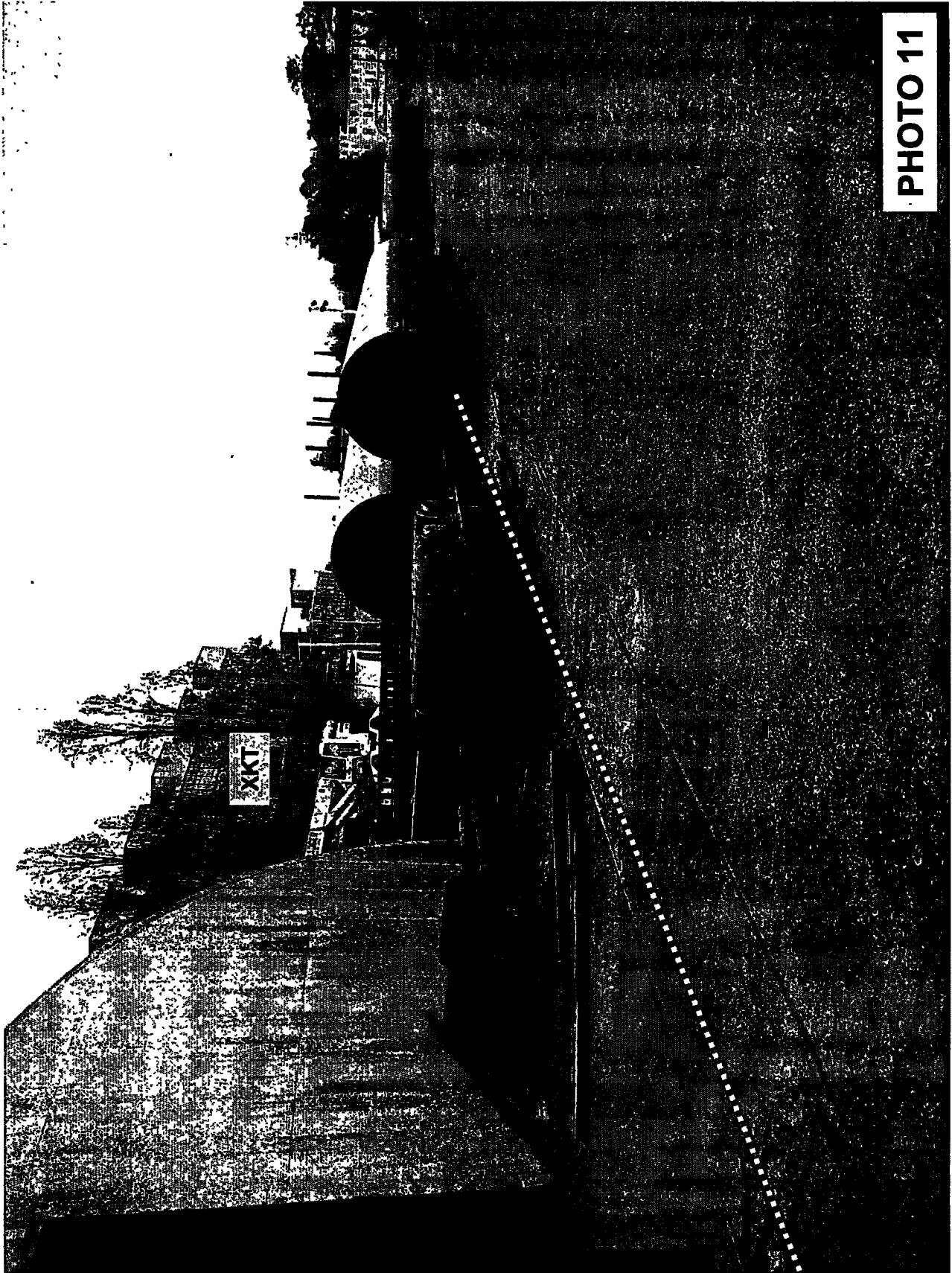
PHOTO 9



rail trackage in XKT's yard  
(under pipe)

PHOTO 10

PHOTO 11



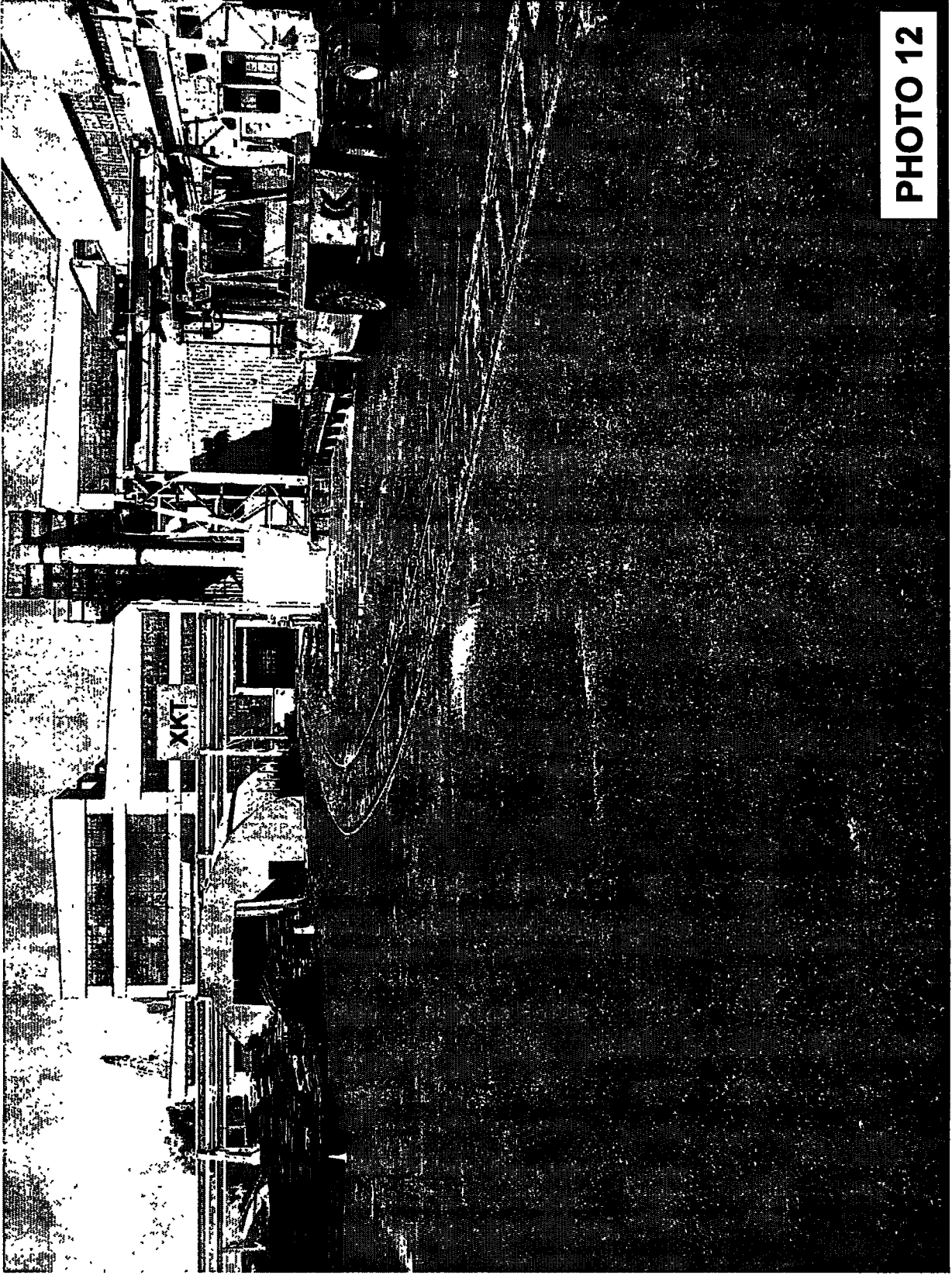


PHOTO 12

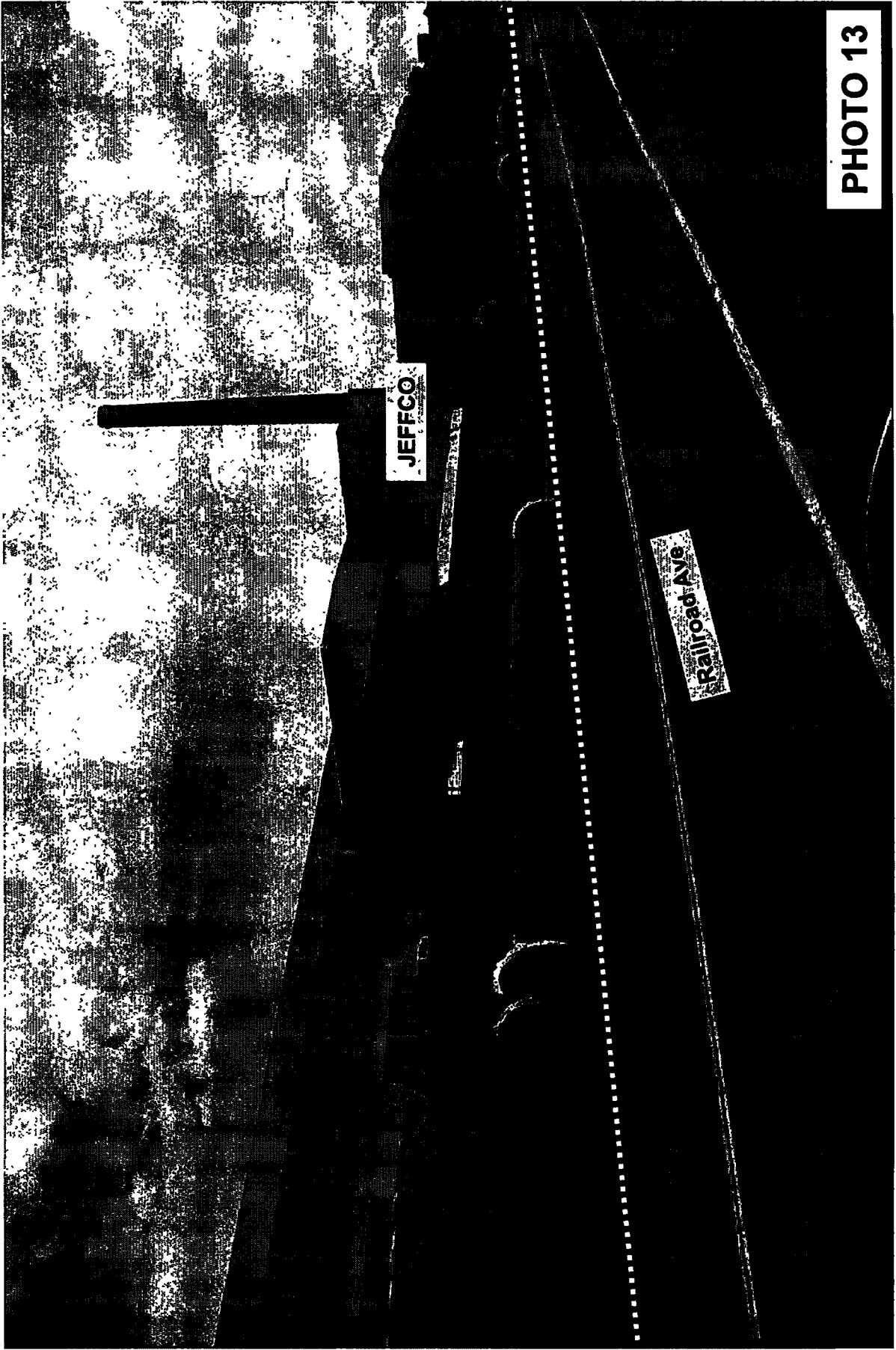


PHOTO 13

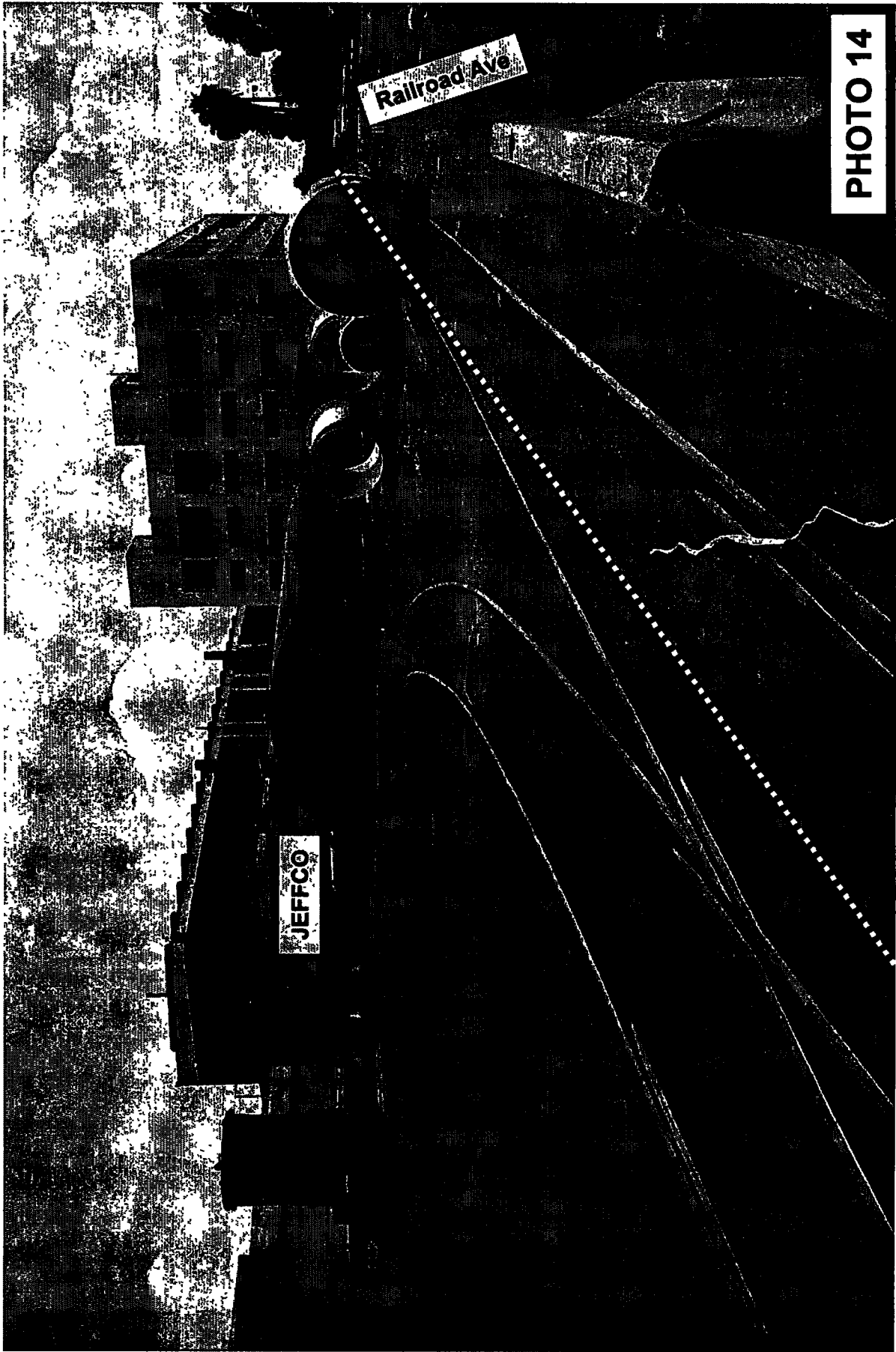


PHOTO 14

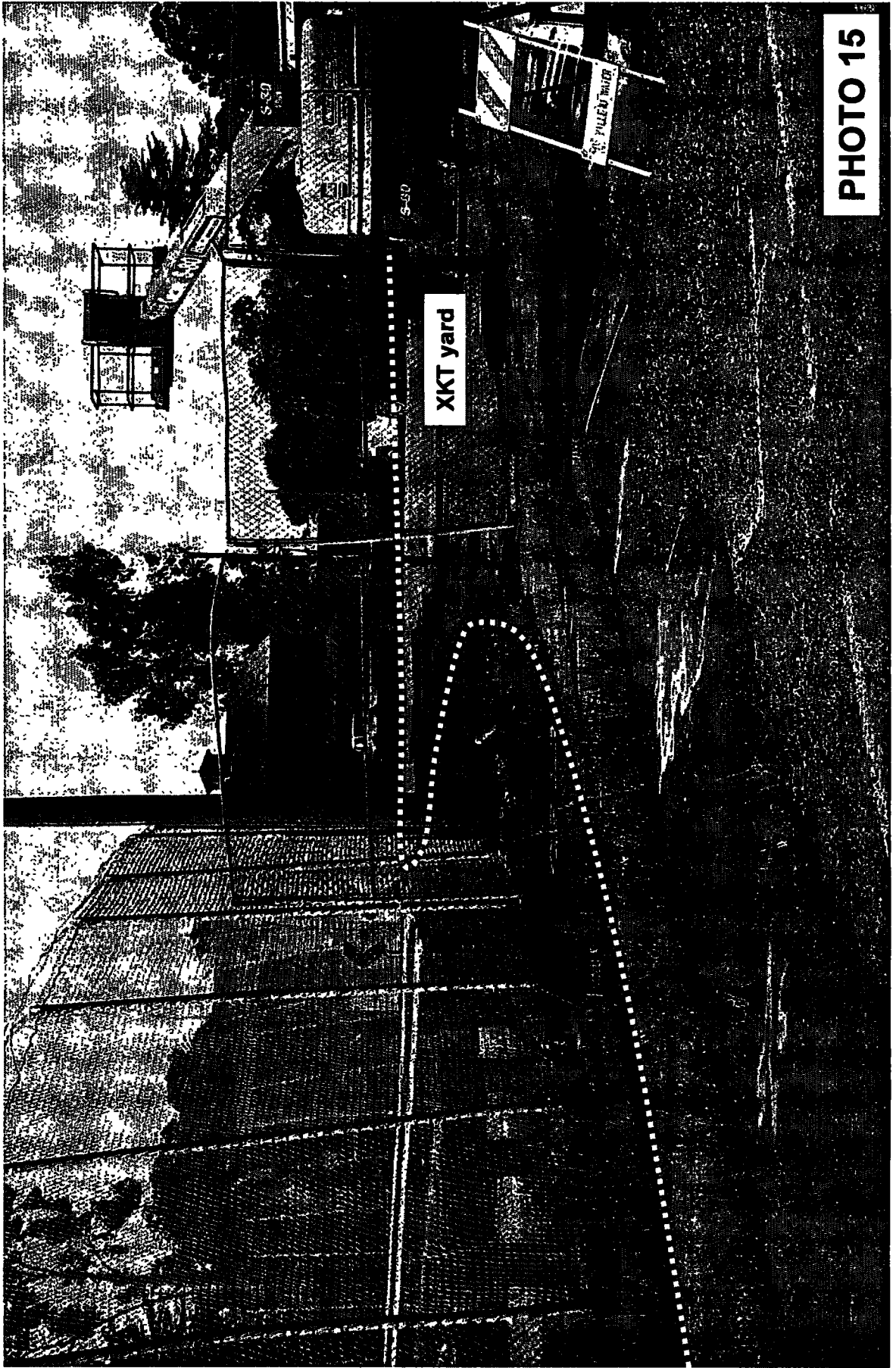


PHOTO 15



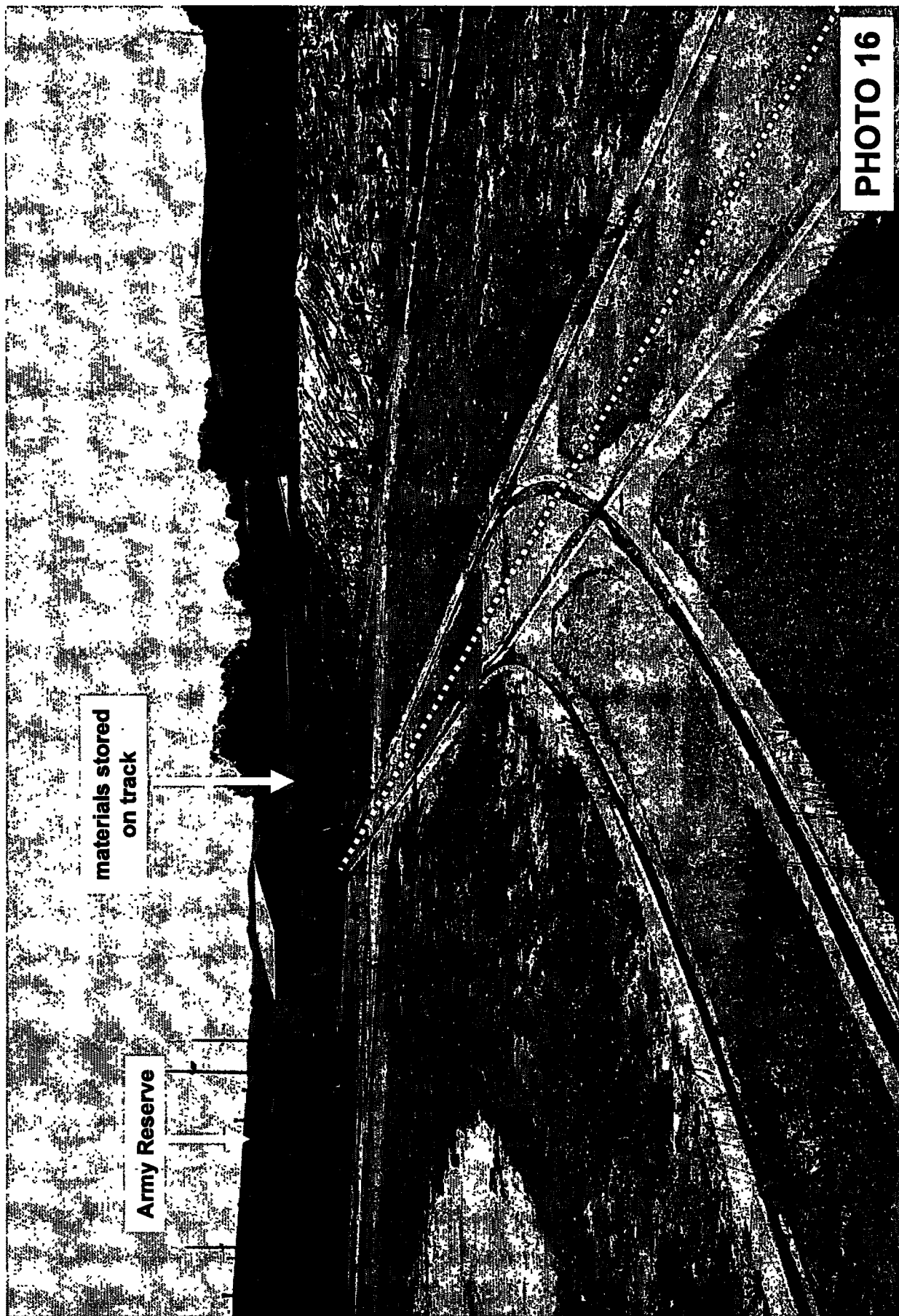


PHOTO 16



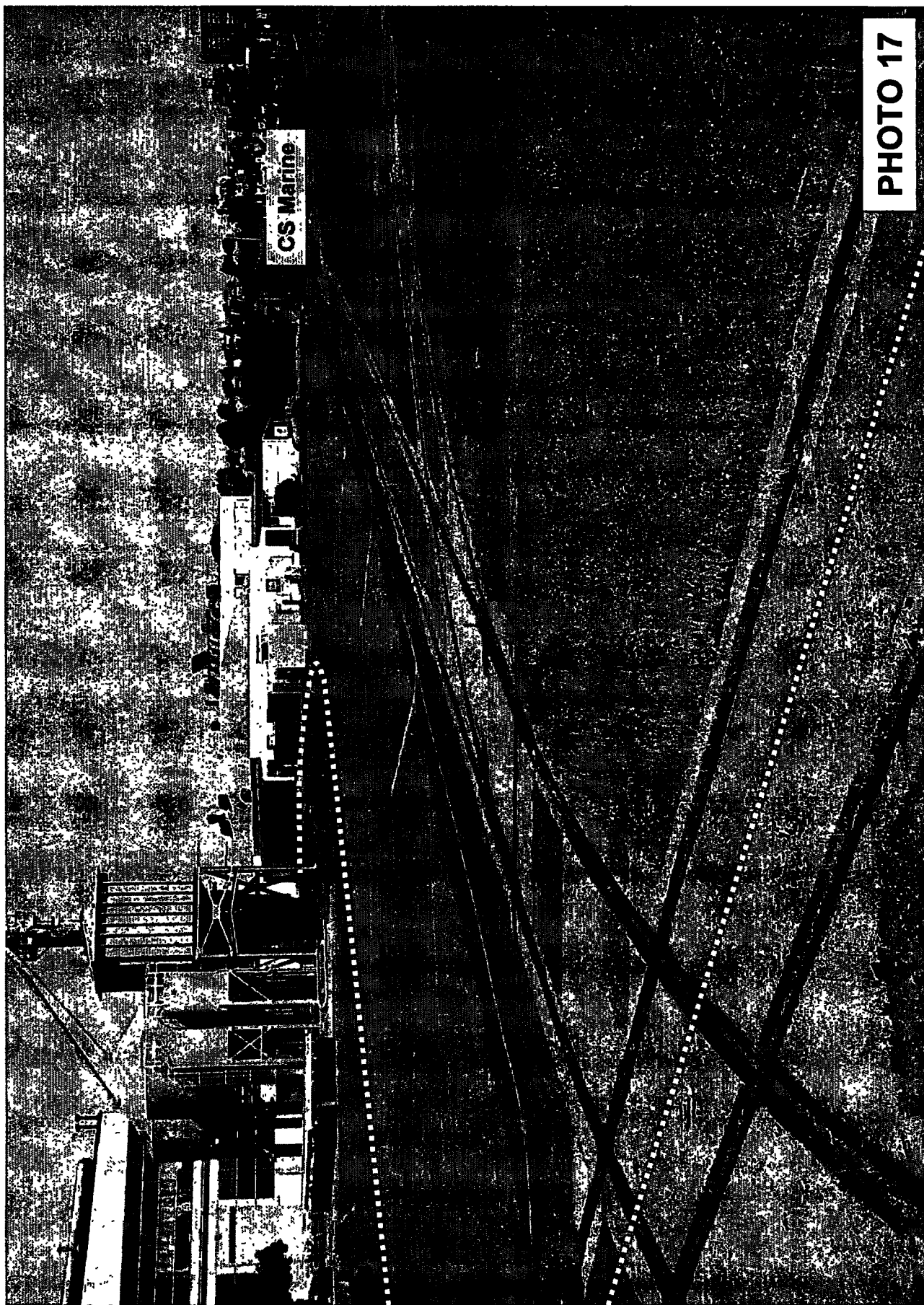


PHOTO 17

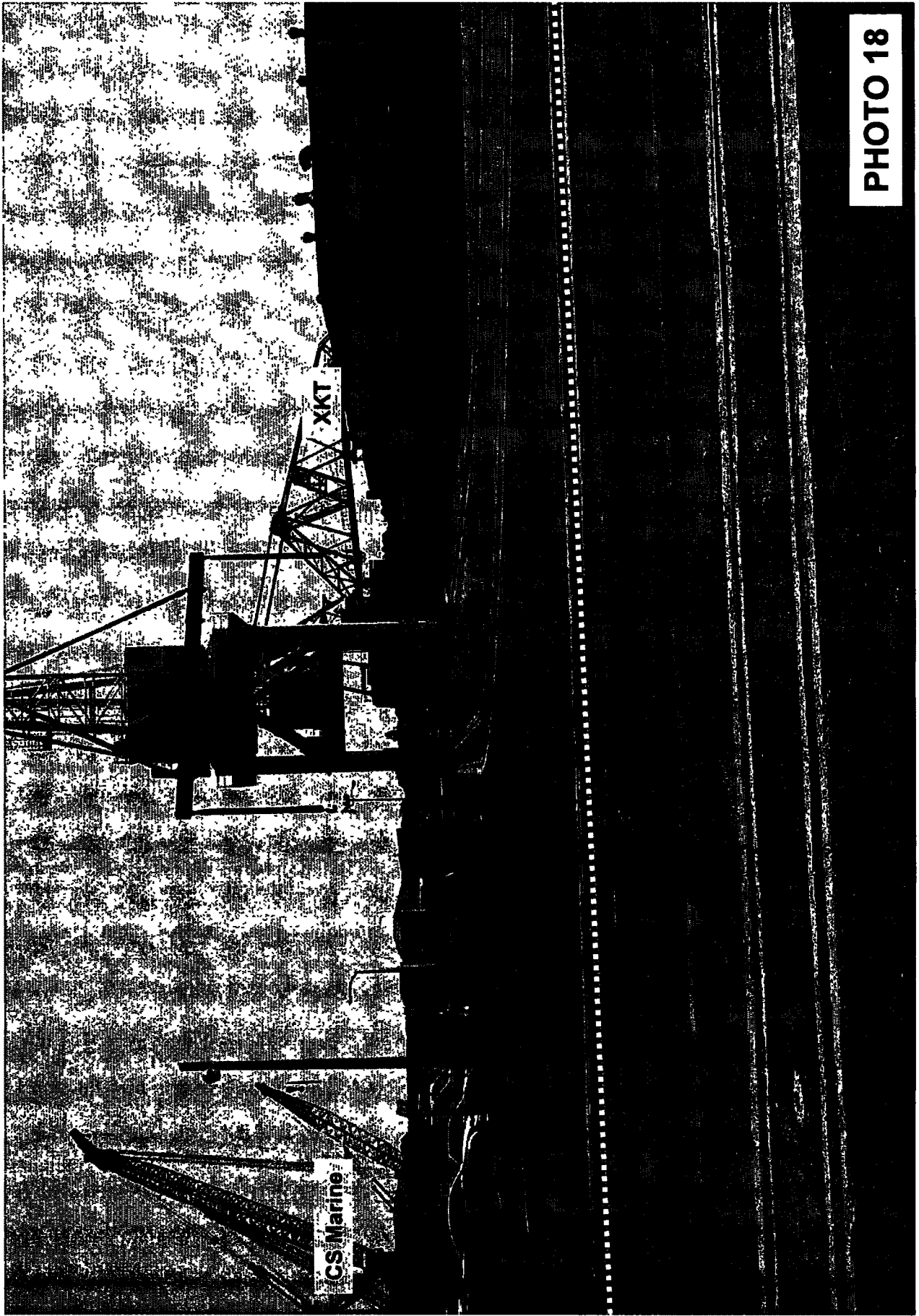


PHOTO 18



PHOTO 19

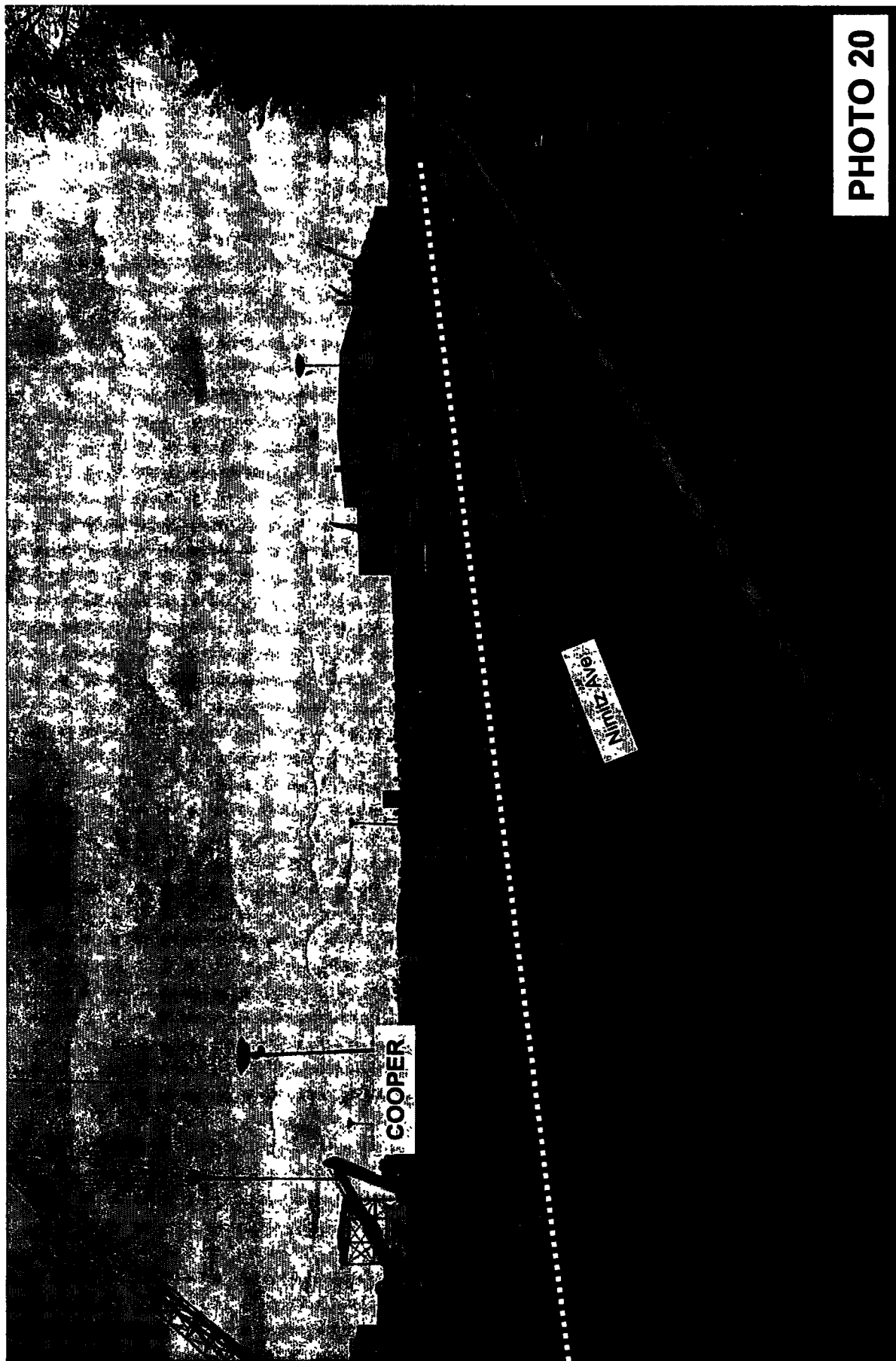


PHOTO 20

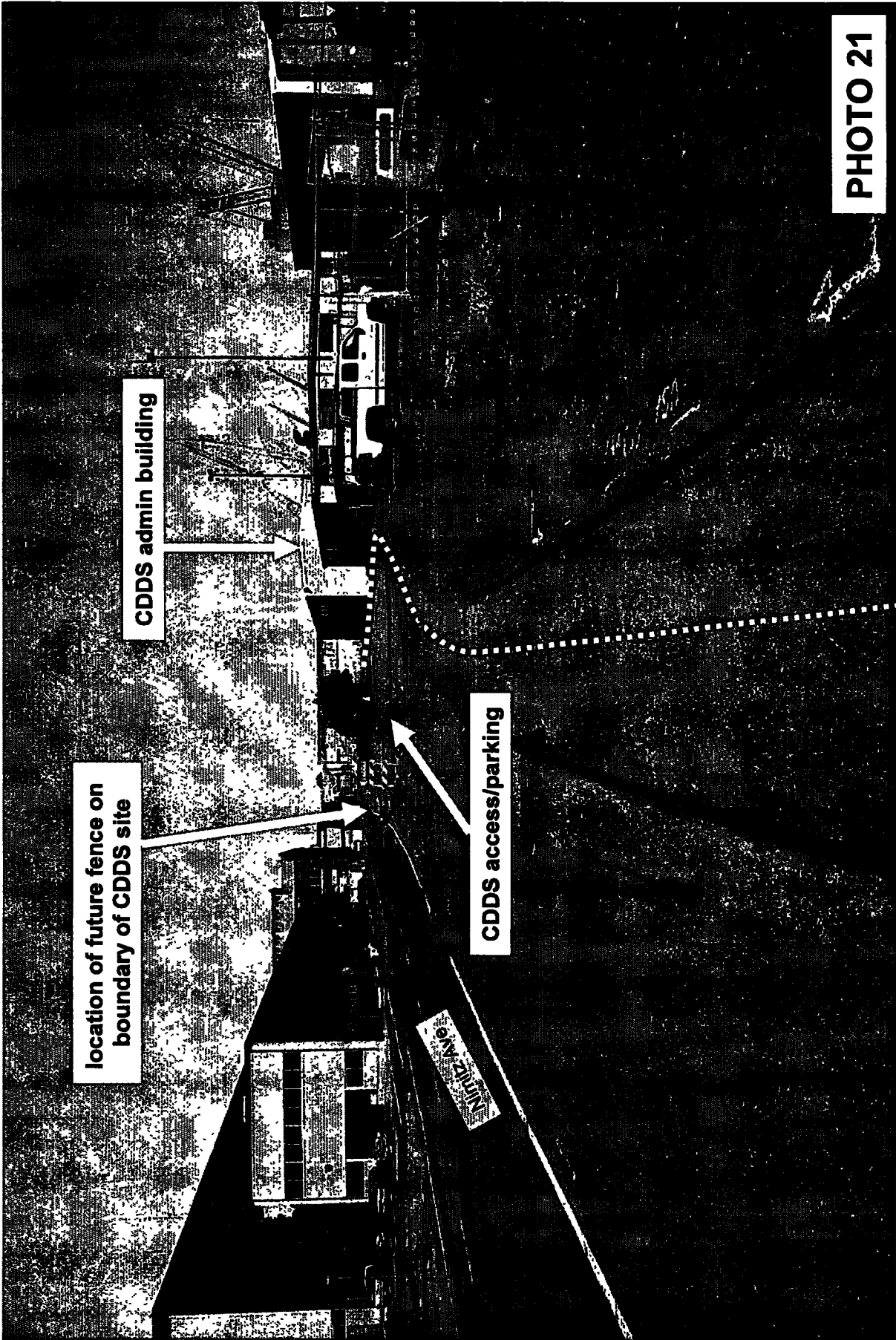
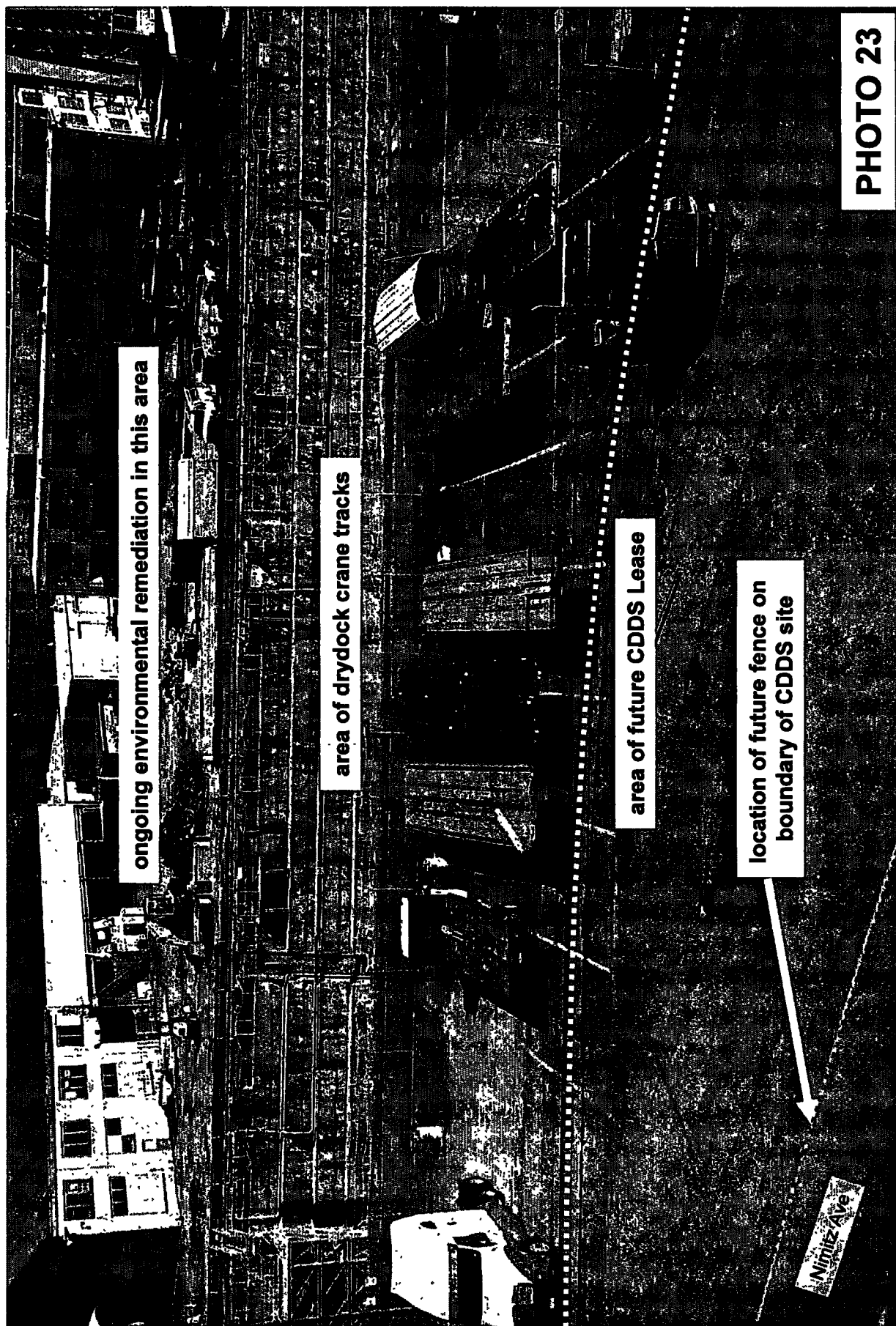


PHOTO 21





**PHOTO 22**



ongoing environmental remediation in this area

area of drydock crane tracks

area of future CDDS Lease

location of future fence on  
boundary of CDDS site

Nimitz Ave

PHOTO 23

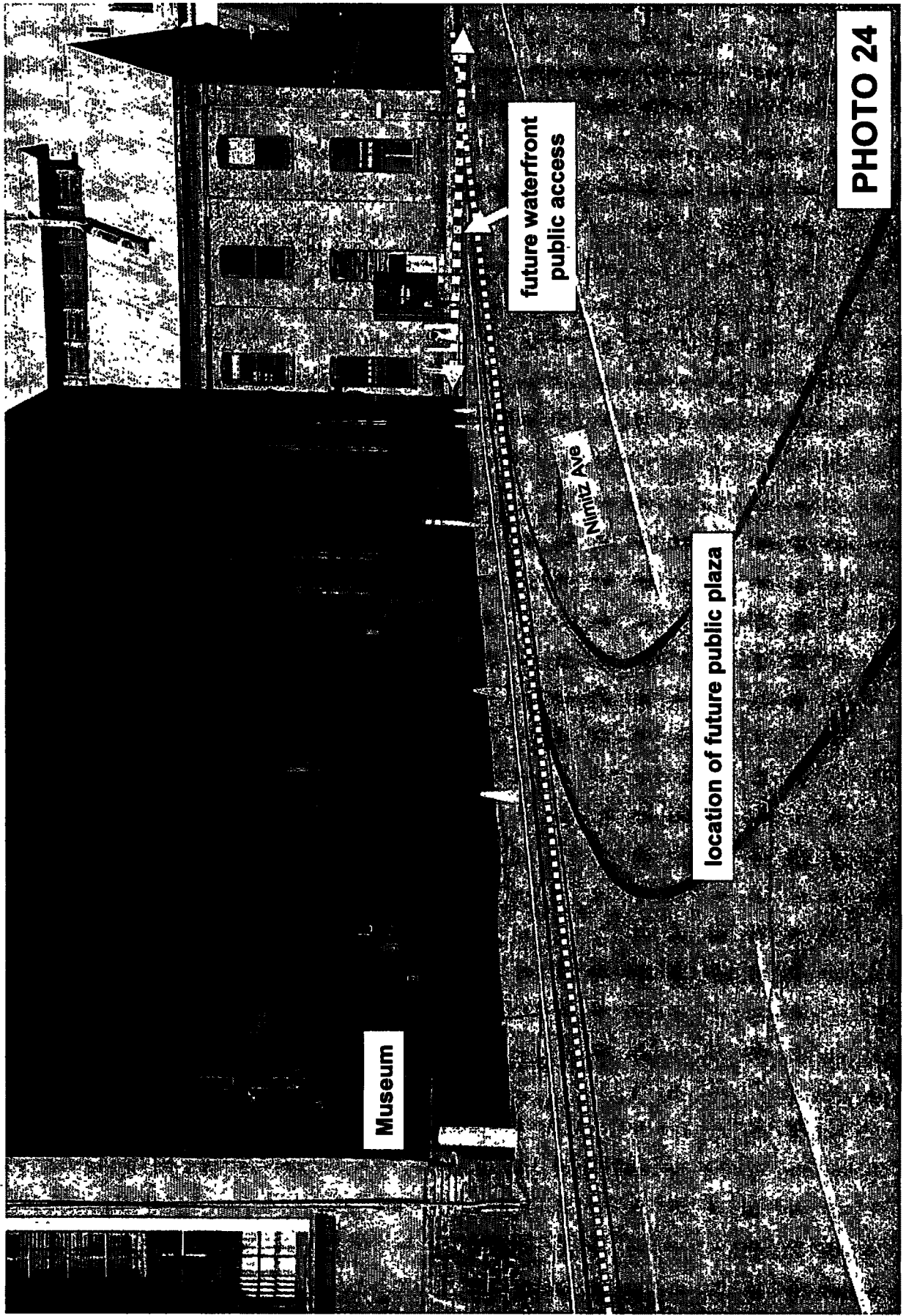


PHOTO 24



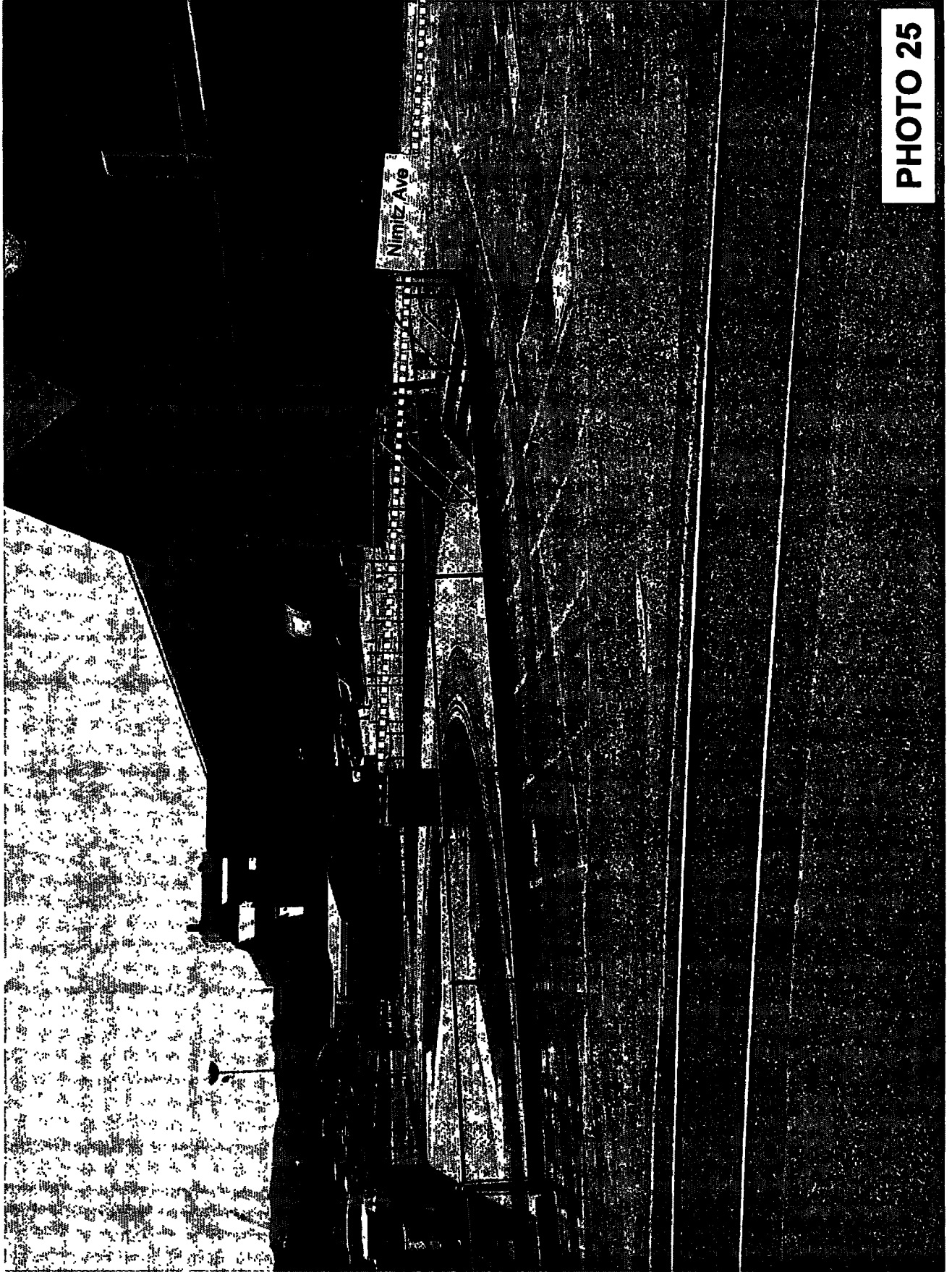
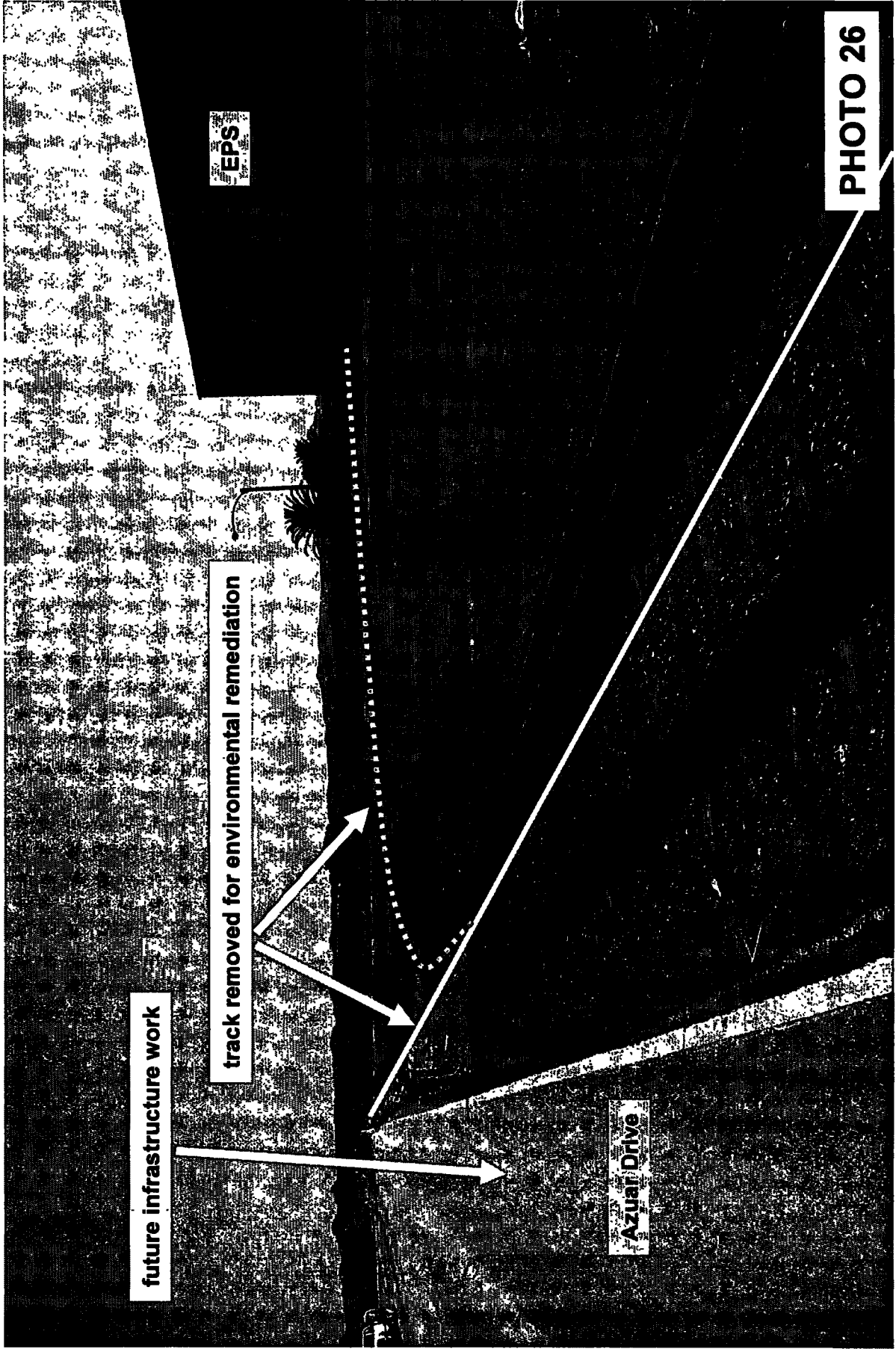


PHOTO 25



future infrastructure work

track removed for environmental remediation

EPS

PHOTO 26

Azual Drive

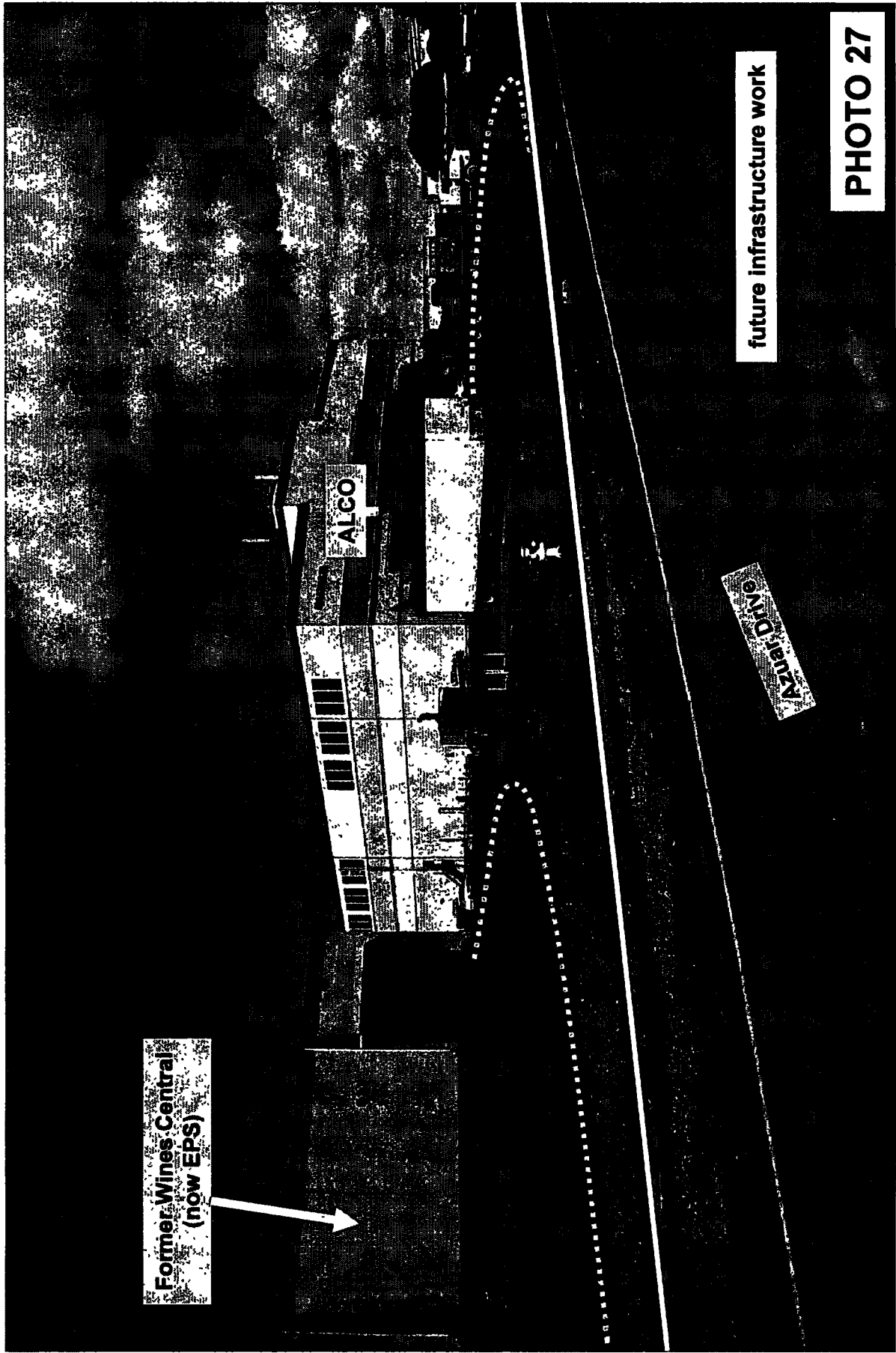
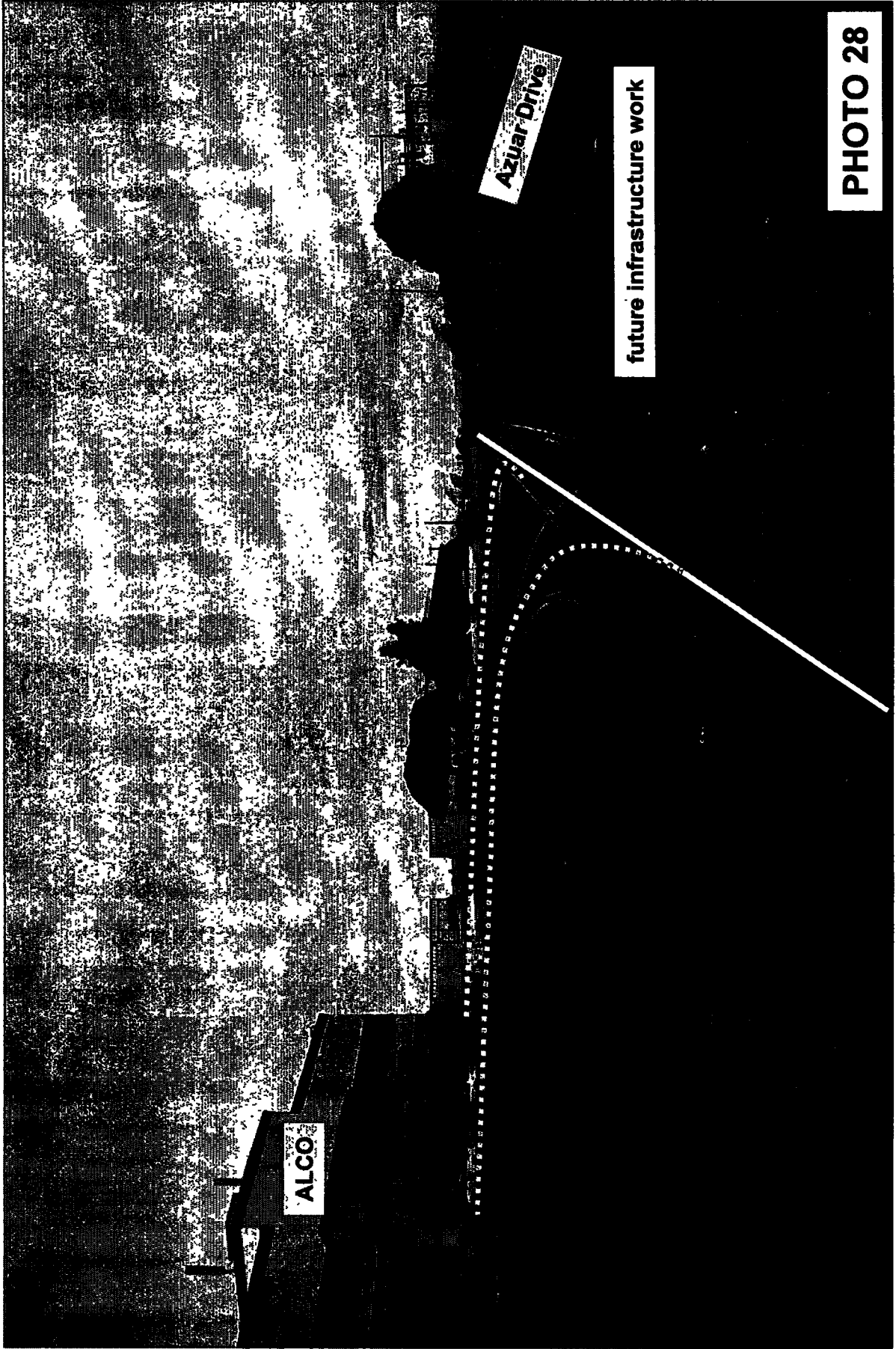


PHOTO 27



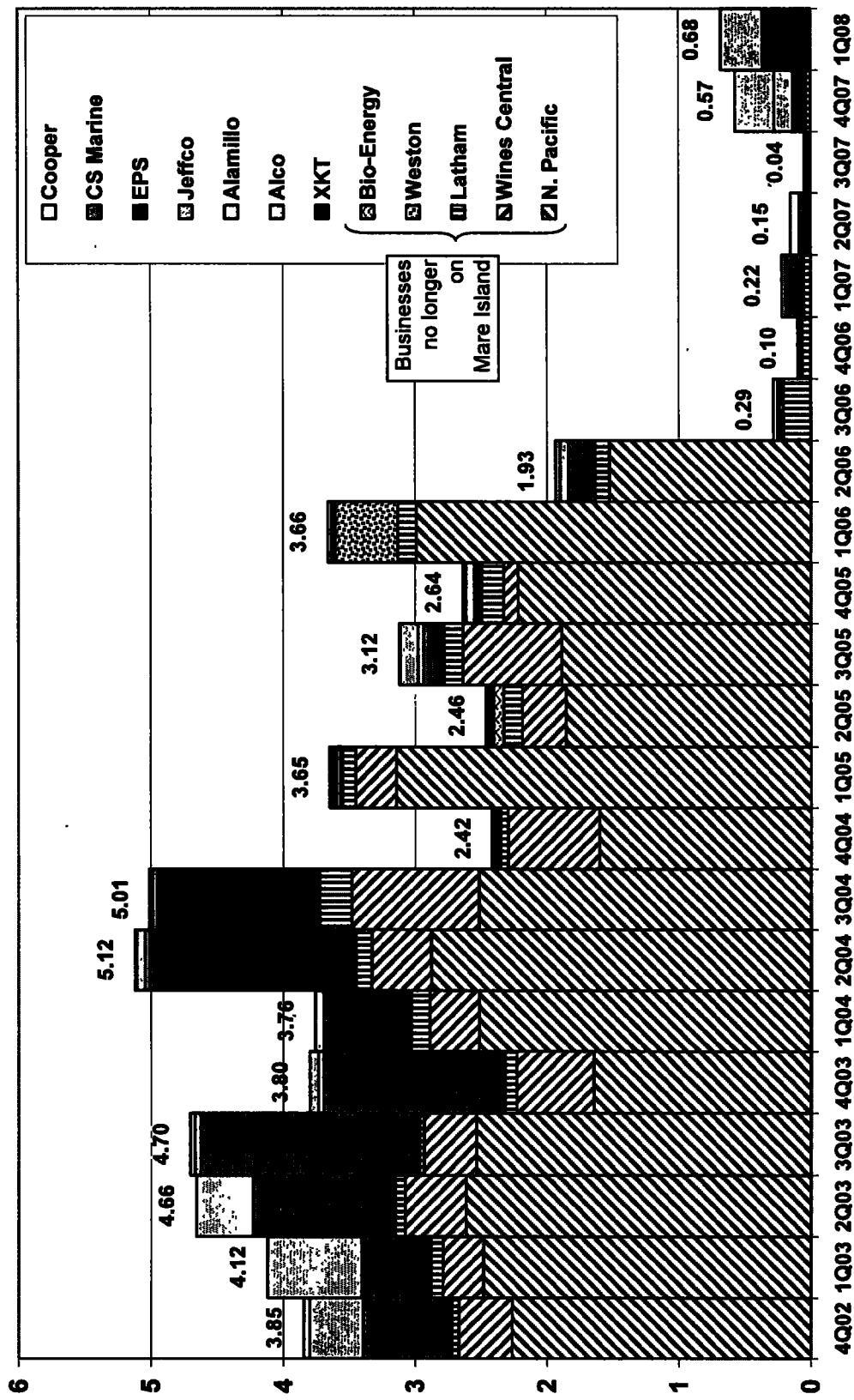
future infrastructure work

PHOTO 28

**Exhibit B to April 5, 2010  
Verified Statement of Thomas Sheaff**

# EXHIBIT B

Mare Island Rail Shipment Volumes  
(Avg. Cars Per Day)



**Exhibit C to April 5, 2010  
Verified Statement of Thomas Sheaff**



# MARE ISLAND

## RAILROAD AVENUE IMPROVEMENTS

June 19, 2008

VALLEJO, CALIFORNIA

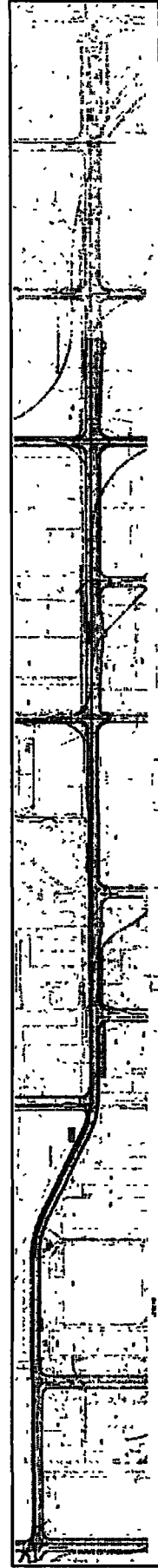
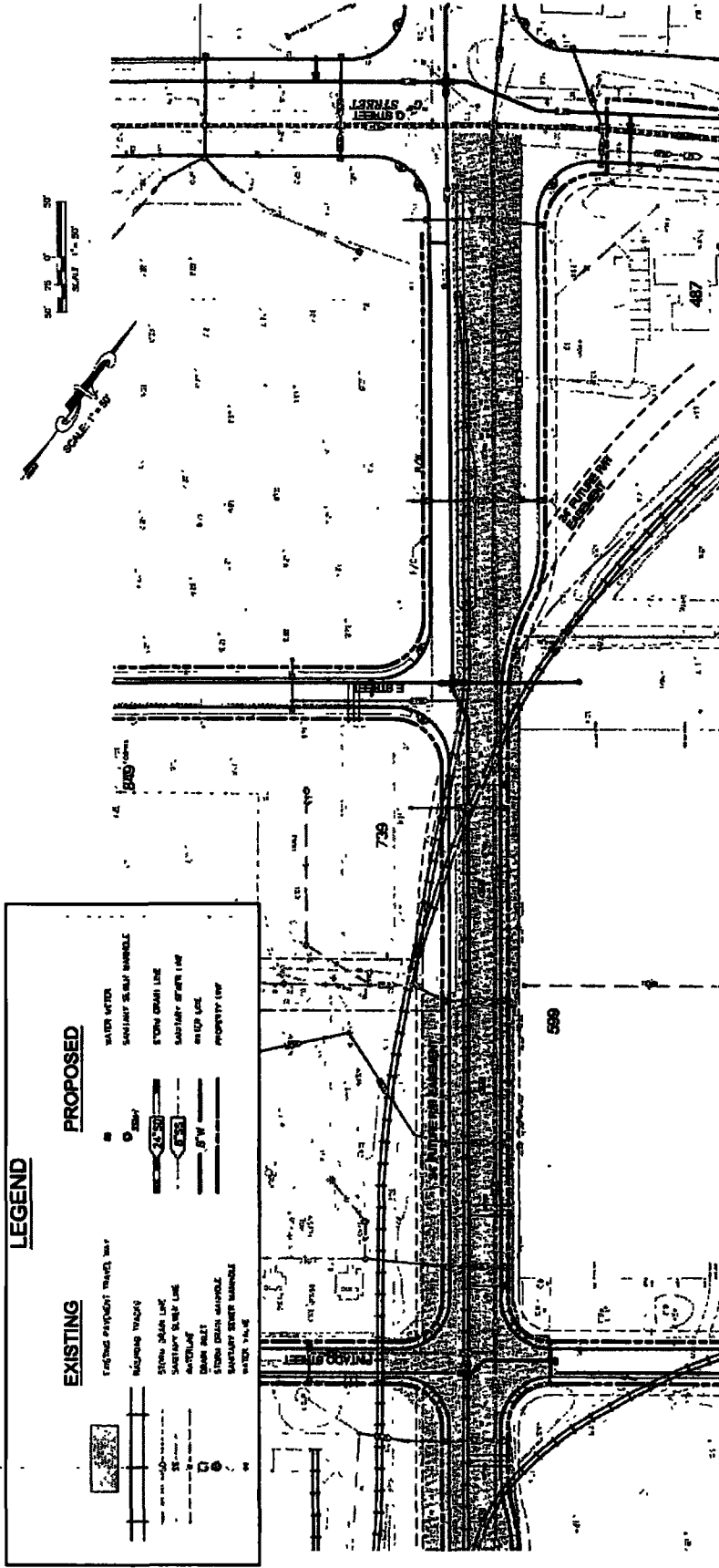




# MARE ISLAND



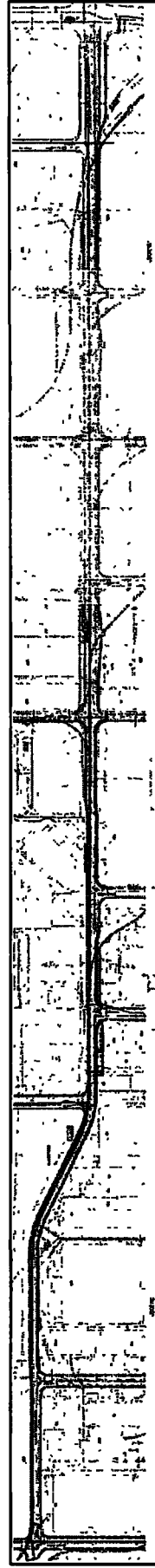
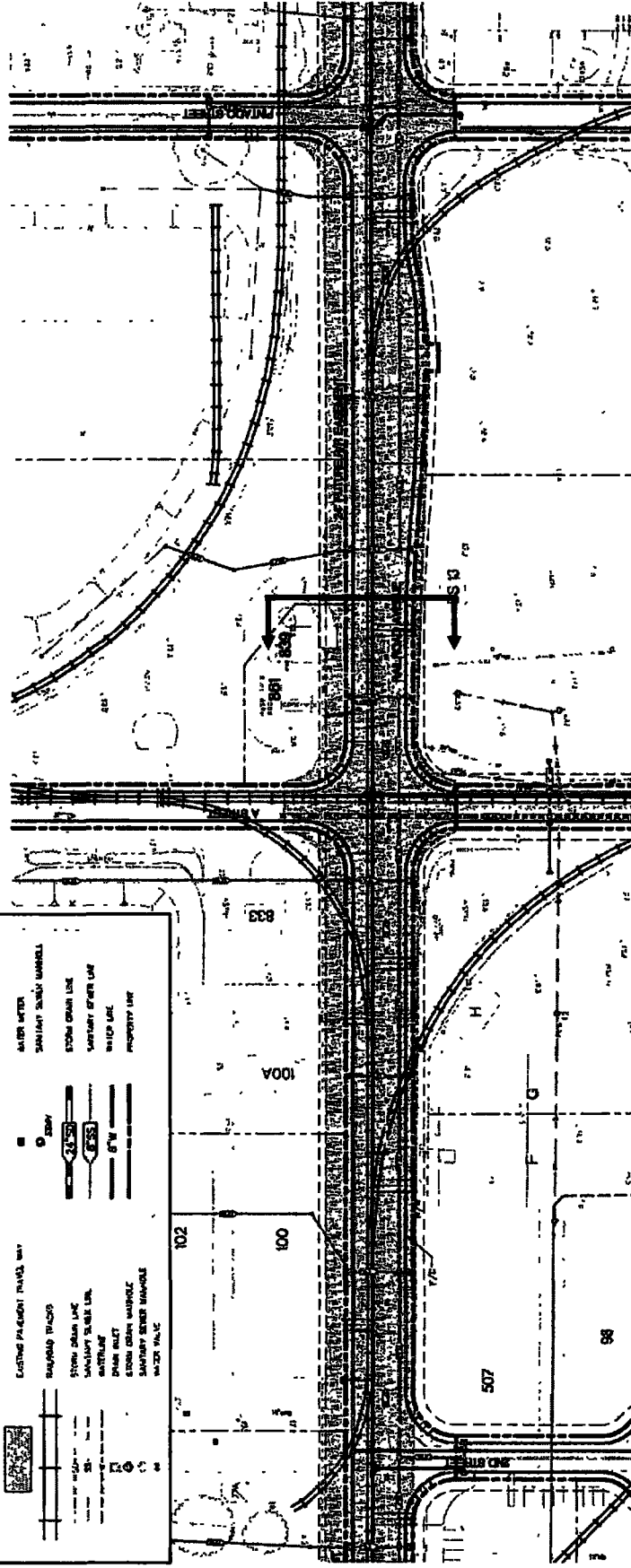
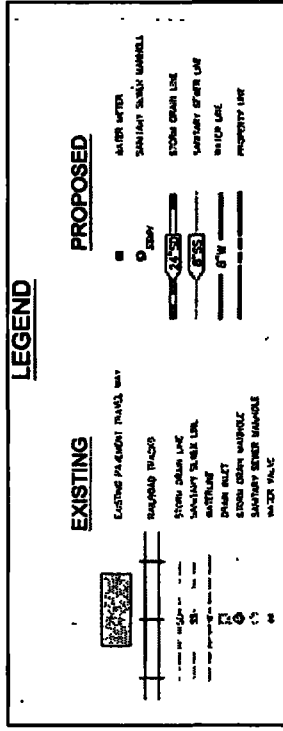
# Railroad Ave - G St. to Pintado St.



MARE ISLAND

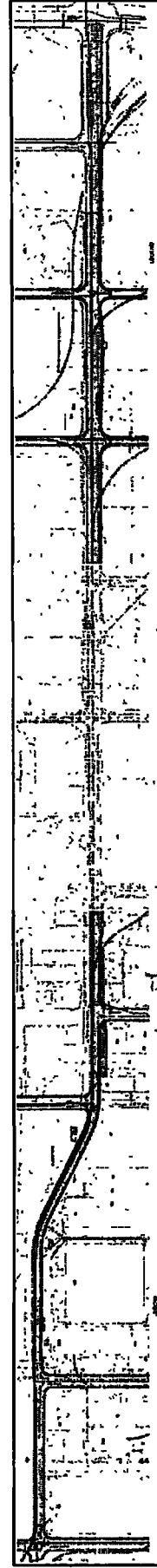


# Railroad Ave – Pintado St. to 2nd St.

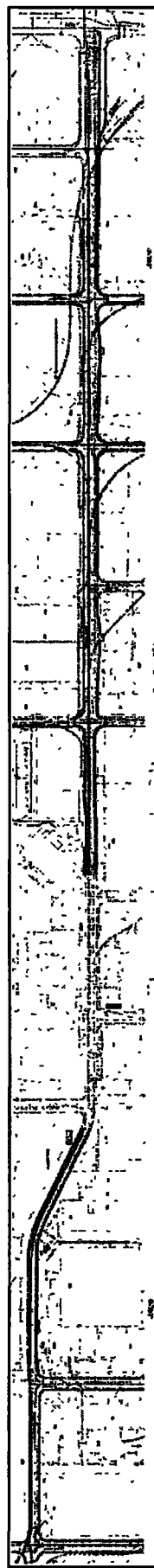


MARE ISLAND





# MARE ISLAND



# MARE ISLAND



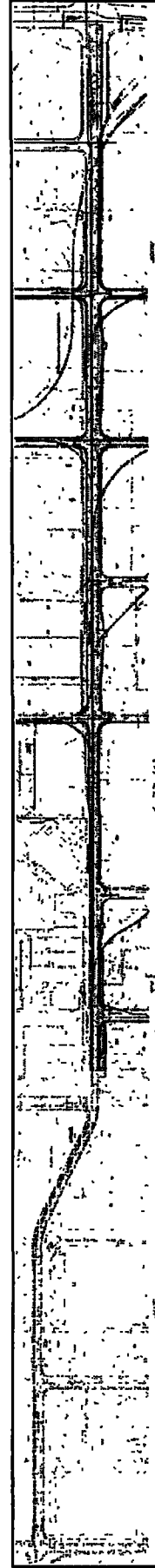
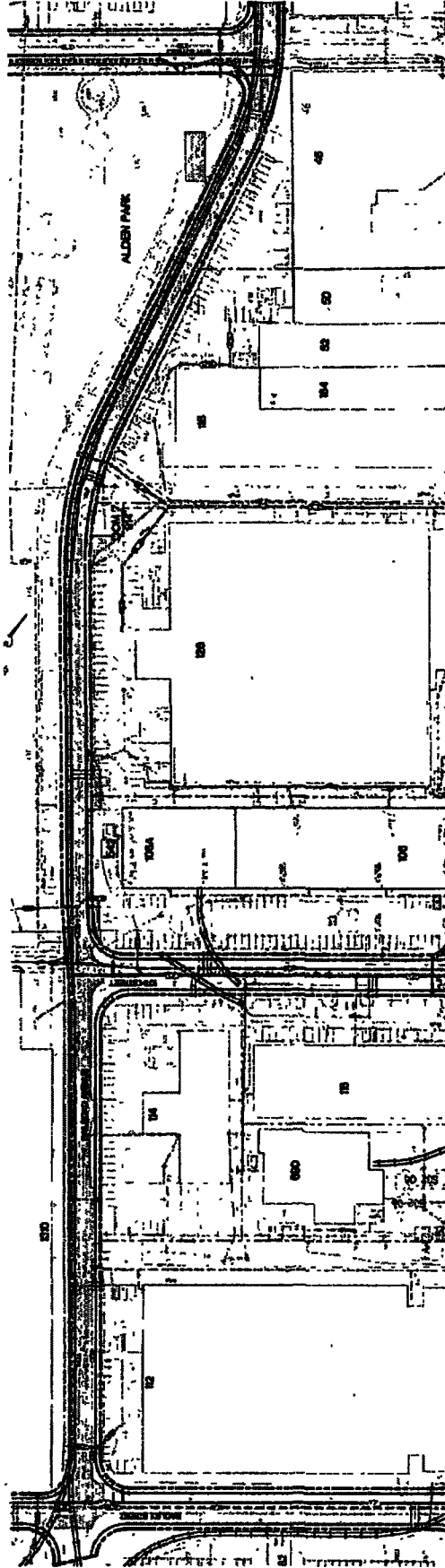
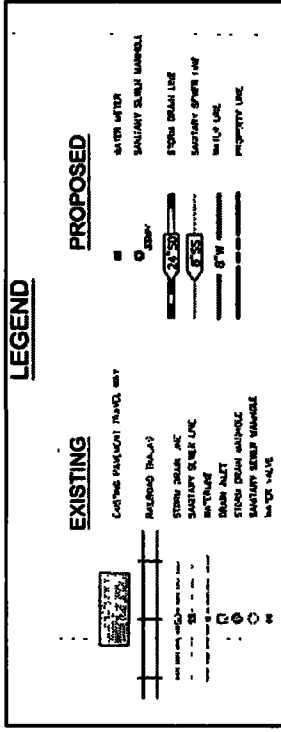
# Railroad Ave – Existing Infrastructure



MARE ISLAND



# Railroad Ave – 8<sup>th</sup> St. to Bagley St.



MARE ISLAND



**Exhibit D to April 5, 2010  
Verified Statement of Thomas Sheaff**

## Hadsell, Kaye KWP

---

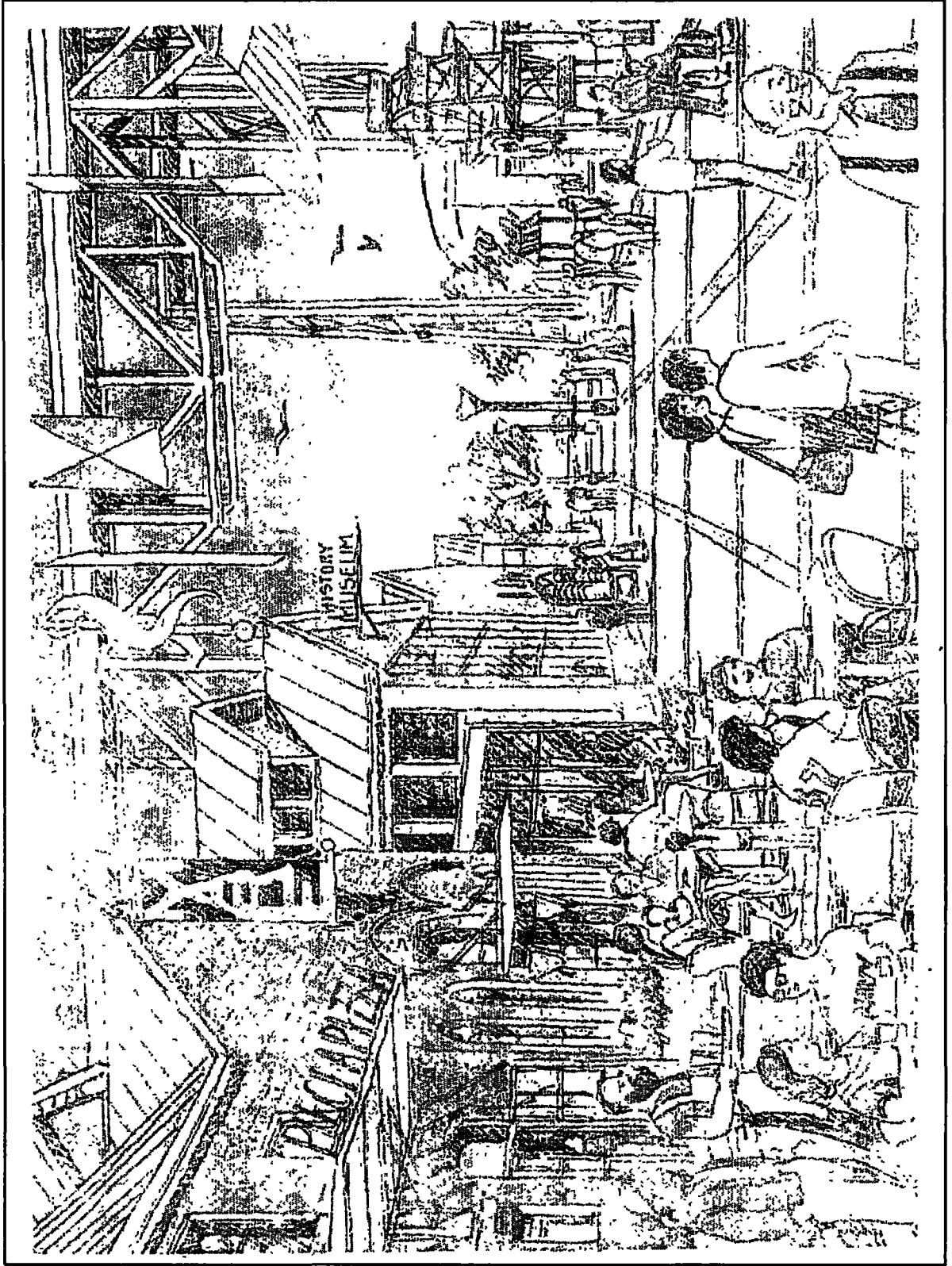
**From:** dave.scherer@industrialrailways.com  
**Sent:** Thursday, April 01, 2010 1:29 PM  
**To:** Hadsell, Kaye KWP  
**Subject:** Jeffco-XKT

As former railroad track inspector for Kennedy Wilson the portion of track from Bagley and Railroad Ave servicing Jeffco and XKT had been taken out of service. The Cal Northern Railroad did not service this section of track or go past this intersection. The only use of this section of track was for internal use by Jeffco.  
Sent on the Sprint® Now Network from my BlackBerry®

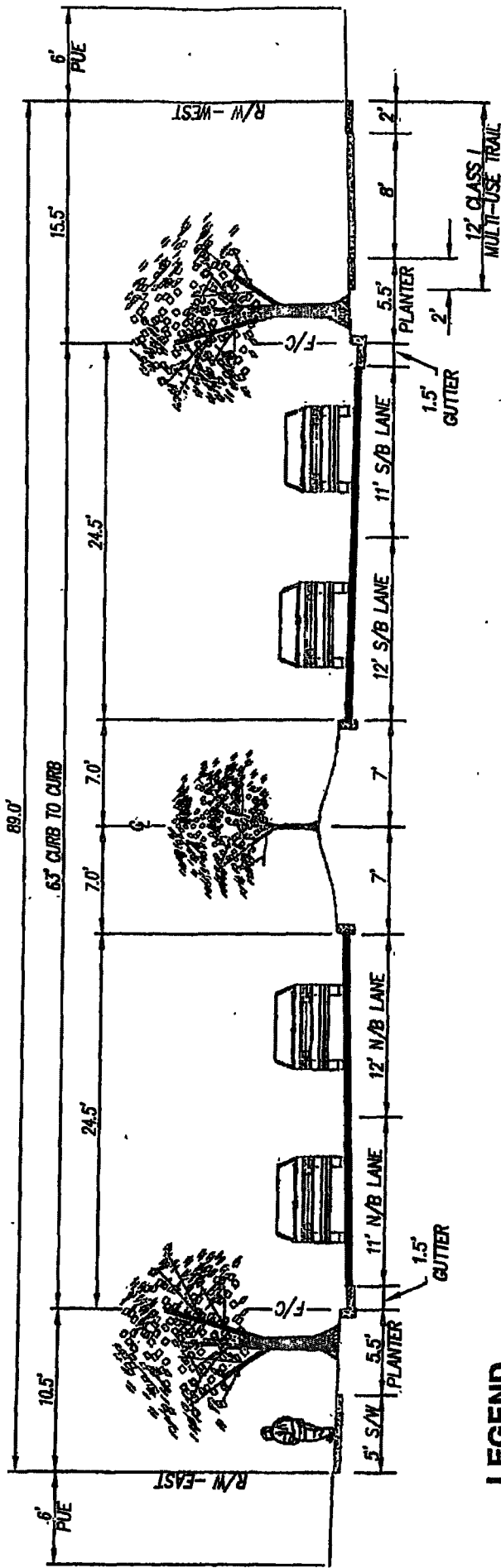
**Exhibit E to April 5, 2010  
Verified Statement of Thomas Sheaff**

# EXHIBIT E

Rendering of Planned Public Plaza  
at Mare Island Historic Core



**Exhibit F to April 5, 2010  
Verified Statement of Thomas Sheaff**



## LEGEND

- NEW 6" VERTICAL CURB & GUTTER (CITY STD. DWG. NO. 3-10)
- NEW 6" TYPE "A" VERTICAL CURB (14" DEEP)
- PUBLIC UTILITY EASEMENT
- SOUTHBOUND
- NORTHBOUND
- SW SIDEWALK
- FACE OF CURB

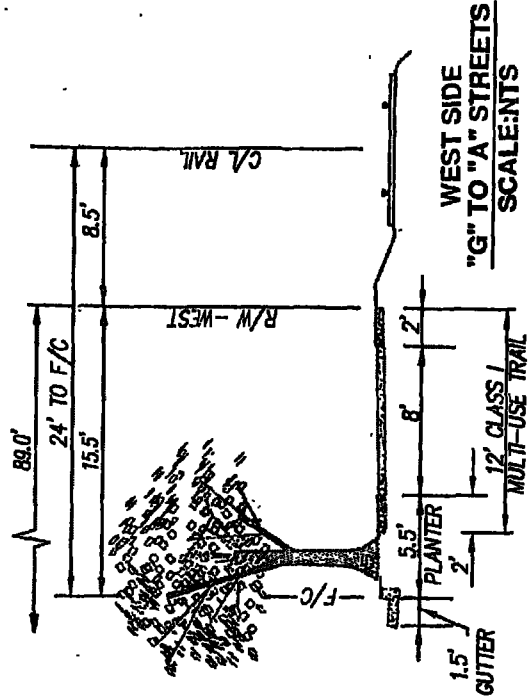
PREPARED FOR:



LENNAR MARE ISLAND

PREPARED BY:

**CHAUDHARY & ASSOCIATES, INC.**  
 ENGINEERS SURVEYORS INSPECTORS  
 1000 N. VALLEY VIEW AVENUE, SUITE 100, WILSON, CA 95605-1000  
 PHONE (916) 261-1175 FAX (916) 261-1175  
 WILSON, CA 95605-1000 FAX (916) 261-1175



# AZUAR DRIVE PROPOSED STREET CROSS-SECTION "G" STREET TO KANSAS STREET SCALE: NTS

DATE	REVISION #	DESCRIPTION	INIT.
04/04/03	0	INITIAL SUBMITTAL	
11/14/03	1	SECOND SUBMITTAL	
02/20/04	2	THIRD SUBMITTAL	

**Exhibit G to April 5, 2010  
Verified Statement of Thomas Sheaff**



Cliff Miller  
<CMiller@lnrproperty.com>

To: "Tom Sheaff (E-mail 2)" <tom.sheaff@Lennar.com>  
cc: "Victor Zayas (E-mail)" <victor@earthquakeprotection.com>  
Subject: Rail use

06/05/2003 05:38 PM

Tom- I spoke to Victor and he said he may use the RR infrequently depending on cost vs trucking. I told him we charge back our track maintenance costs to the users pro rata by # of cars they use. He isn't concerned if the RR is curtailed completely.

Cliff Miller  
Lennar Partners  
1600 Harbor Bay Pkwy #100  
Alameda, Ca 94502  
510-747-1560-office  
415-559-9899-cell  
510-747-1561-fax  
cmiller@lnrproperty.com  
<<Miller, Cliff (E-mail).vcf>>



Miller, Cliff (E-mail).v



**Exhibit H to April 5, 2010  
Verified Statement of Thomas Sheaff**

March 7, 2008

Mayor Osby Davis  
Vice Mayor Tom Bartee  
Councilwoman Erin Hannigan  
Councilwoman Stephanie Gomes  
Councilwoman Joanne Schivley  
Councilman Hermie Sunga  
Councilman Michael Wilson  
Vallejo City Council  
555 Santa Clara Street  
Vallejo, CA 94590-5934



Re: Rail Service on Mare Island

Dear Mayor, Vice Mayor and Council Members:

In order for Lennar Mare Island, LLC (LMI) to move forward with the implementation of the Reuse Plan for Mare Island and meet its commercial development obligations to the City, the future of rail service on Mare Island must be addressed immediately.

LMI has always supported rail service on Mare Island. At the time of Early Transfer in 2002 and to accommodate a City of Vallejo requirement that it not own contaminated property, LMI agreed to take temporary ownership. All parties agreed to the temporary nature of this arrangement and the fact that it was never the intent that LMI would be responsible for the long-term ownership of the rail. LMI has dedicated a large amount of resources and assumed significant liability in relation to the rail operation. LMI has also expended funds associated with planning and entitlement in LMI's efforts to continue the rail operation.

For more than seven years LMI has been meeting with the Mare Island businesses, California Northern Railway and the City regarding a permanent solution to continue the service. LMI has worked diligently with California Northern, Mare Island's rail service provider, to develop a plan for the future of rail on Mare Island. Unfortunately, California Northern has been unwilling to assume reasonable liability resulting from their operating rail cars or participate in the capital improvements required for this service. LMI has also worked with the City of Vallejo and the Mare Island business community to explore creative solutions, including financial participation, with no success. To date, no one has come forward with a solution for funding the required upgrades or long-term costs. The reality is that without the financial support of these groups, rail service is not a feasible long-term option for Mare Island.

LMI is preparing plans for street improvements and other important infrastructure upgrades that are critical to continue commercial development. If rail service were to continue, the California Public Utilities Commission ("CPUC") requires extensive improvements including new signals, crossing arms, complete encapsulation of underground utilities, and a host of other improvements to bring Mare Island's rail service up to modern standards. The current estimate to complete the upgrades is approximately \$11 million. The City of Vallejo Public Works Department supports the requirements imposed by the CPUC.

As you are now aware, LMI has notified California Northern Railway and the tenants who use the rail that rail service will discontinue as of March 31, 2008.

**LENNAR MARE ISLAND**

A JOINT VENTURE OF LNR PROPERTY CORPORATION & LENNAR COMMUNITIES  
690 Walnut Avenue, Suite 100 Vallejo, California 94592  
707.562.4000 tel 707.562.4002 fax

To summarize a few facts regarding this matter:


1. For over seven (7) years LMI has met with the tenants, California Northern, and the City on numerous occasions. During these meetings, LMI has informed all parties that if solutions could not be found, the rail service would have to be discontinued.
2. Cost is the largest issue. The Specific Plan anticipated a joint funding mechanism would be developed for necessary upgrades and maintenance between the Master Developer, the users of the freight rail service, the City of Vallejo, and the railroad service provider. To date, no other party is willing to participate, at any reasonable level, in joint funding of the necessary upgrades.
3. To facilitate the continued use of the rail service, LMI is required to make periodic inspections of the track and provide maintenance. LMI contracts for this ongoing maintenance and invoices the tenants based on the number of cars they used during that maintenance period to recover the cost. No additional fees are added by LMI for this service.
4. California Northern's unwillingness to accept reasonable hold harmless and indemnification language poses substantial risk to both the City and LMI if there are uncovered insurance claims for liability above the insurance limits of California Northern.

Attached is a sample copy of the letter sent to the rail users. LMI has kept communications open with XKT and other rail users about the potential that service to the island would be discontinued. In fact, LMI met with XKT, Alamillo Steel, and California Northern last summer to look at a site in Vallejo where California Northern could offload goods onto a truck for final delivery. At that time and since then, LMI has discussed the timing of discontinuance so as to allow delivery of goods already on order.

LMI supports continuing rail service to Mare Island and LMI is willing to provide an easement for rail use along Railroad Avenue to leave this option open in the future. However, in order to provide this easement and to avoid further delays in development, LMI will need a financial commitment from the City and/or Mare Island businesses to fund costs associated with providing the easement and to assume long-term responsibility for any rail operation on Mare Island by March 31, 2008.

Please let us know if you have any questions.

Sincerely,



Wanda Chihak  
Lennar Mare Island, LLC

Attachment

Cc: Tom Sheaff  
Joe Tanner  
Craig Whittom  
Brian Dolan  
David Kleinschmidt  
Gil Hollingsworth



**Exhibit I to April 5, 2010  
Verified Statement of Thomas Sheaff**

# LENNAR MARE ISLAND

## MEMORANDUM

**Date:** January 2, 2002

**To:** All Mare Island Railroad Users  
Alco, Jeffco, Latham Truss, North Pacific Group, Wines Central and KKT

**From:** Lennar Mare Island

**Re:** Current Status / Future Obligations

---

As most of you are aware, we have been in the process of meeting with the PUC and railroad inspectors and contractors in order to keep the Mare Island railroad system (including the portion of the track from the Causeway out to Flodden Yard) properly repaired and maintained.

Up until March 2002, the system was maintained by either Rail America (formerly California Northern), the Navy or the City of Vallejo. The Navy is no longer obligated as a result of the transfer of Mare Island and Rail America has declined to participate.

**Lease Agreement:** As you are aware, your lease agreement allows the Landlord to charge you for your share of the usage. LMI has discussed this with most of the users, and the most reasonable and fair allocation is as follows:

### **Cost**

Currently, the cost to maintain and repair the rail system through December 31, 2003 is as follows:

Inspection / Reports	\$16,800	(1,400 per month)
Immediate PUC requirements	\$25,000	
- repairs and maintenance		
Ongoing repairs and maintenance	<u>\$12,000</u>	
Annual Estimate	\$53,800	

### **Allocation**

The costs will be allocated on a per car basis among the users of this service. Each quarter, LMI will obtain the records from Rail America indicated usage, and the amounts will be added to your monthly invoice.

**Commencement**

Charges will commence January 1, 2003, and they will include costs and expenses associated with current inspections, maintenance and repairs.

**Reconciliation**

At the end of each calendar year, in accordance with your lease agreement, a reconciliation will be performed. Any credit will be either returned to you or credited against future payments.

**Termination**

1. Tenant: No Mare Island business is obligated to use the system. If your business does not use the rail, you will not be invoiced.
2. You should also be advised that the Landlord is under no obligation to provide this service.

If you have any questions, please do not hesitate to contact our office at 707-562-4003.

**Exhibit J to April 5, 2010  
Verified Statement of Thomas Sheaff**

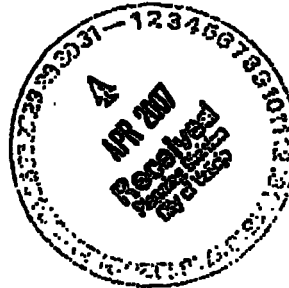
STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94108-0208

April 25, 2007

Michelle Hightower  
City of Vallejo, Planning Division  
555 Santa Clara Street  
Vallejo, CA 94590

RE: Mare Island Town Center

Dear Ms. Hightower:

As the state agency responsible for rail safety within California, we recommend that any development projects planned adjacent to or near the rail corridor in the County be planned with the safety of the rail corridor in mind. New developments may increase traffic volumes not only on streets and at intersections, but also at at-grade highway-rail crossings. This includes considering pedestrian circulation patterns/destinations with respect to railroad right-of-way.

Safety factors to consider include, but are not limited to, the planning for grade separations for major thoroughfares, improvements to existing at-grade highway-rail crossings due to increase in traffic volumes and appropriate fencing to limit the access of trespassers onto the railroad right-of-way. Any project that includes a modification to an existing crossing or proposes a new crossing is legally required to obtain authority to construct from the Commission. We consider every crossing on Mare Island to be public and require Commission authority for modification. If the project includes a proposed new crossing, the Commission will be a responsible party under CEQA and the impacts of the crossing must be discussed within the environmental documents.

Of specific concern is the numerous at-grade highway-rail crossings contained within a small area; six crossings within four square blocks. The CPUC encourages retaining only the at-grade crossings which are absolutely necessary. Azuar Dr, Walnut Ave, and Railroad Ave are the three main streets used for ingress/egress to Mare Island. Increased traffic from the redevelopment in combination with multiple highway-rail crossings in a small area will amplify the risk of injuries due to train accidents.

All proposed crossings will require pedestrian treatment such as ADA compliant sidewalks with proper clearance from the active warning devices. Pedestrian channelization devices must be installed.

All the proposed at-grade highway-rail crossings will require the appropriate safety treatment. Advanced warning signage such as "RxR" pavement markings for each approach lane and W10-1 signs adjacent to the pavement markings are required per California MUTCD [(CA)MUTCD]. R8-8 "Do Not Stop On Tracks" signs must be installed at each crossing that may have vehicles queued onto the tracks. A diagnostic meeting consisting of the Railroad, local authority with jurisdiction over the roadway and the Commission's Rail Crossings Engineering Section must meet as soon as possible at each crossing to discuss needed improvements.



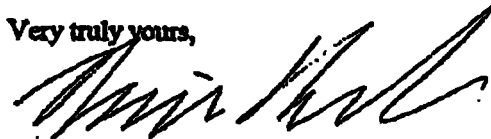
**Initial recommendations for each crossing:**

- Azuar Dr highway-rail crossing will require Commission Standard 9 (flashing light signal assembly with automatic gate) active warning devices. The trees in the southeast quadrant near 26+00 will obstruct sightlines to the active warning devices and will need to be removed from the plans. Preemption will be required at the A St/Azuar Dr intersection to clear any vehicles queued onto the crossing.
- Walnut Ave highway-rail crossing will require Commission Standard 9 (flashing light signal assembly with automatic gate) active warning devices. Presignals will be required on the north approach of the crossing in order to prevent vehicles from queuing on the tracks. Due to the limited access to the southern part of the island, a long freight train could conceivably block every crossing, so consideration should be given to constructing a grade separation for Walnut Avenue at A Street for uninterrupted emergency access.
- A St highway-rail crossing will require Commission Standard 9 (flashing light signal assembly with automatic gate) active warning devices. CPUC staff also recommends installation of raised medians on A St on both approaches to the crossing. Preemption will be required at the A St/Railroad Ave intersection to clear any vehicles queued onto the crossing.
- The street running track on Railroad Ave will require proper delineation such as raised curbs to prevent motorists from traveling within the train dynamic envelope. Street parking should not be allowed along Railroad Ave. A Commission Standard 9 (flashing light signal assembly with automatic gate) active warning device will be required for southbound traffic on Railroad Ave at the crossing to the north of A St as well as the crossing to the south of A St.
- The highway-rail crossing at the Railroad Ave/E St intersection will require Commission Standard 9 (flashing light signal assembly with automatic gate) active warning devices on northbound Railroad Ave and westbound E St. An R3-2 "No Left Turn" Activated Blank Out Sign will be required for southbound Railroad Ave traffic. An R5-1 "Do Not Enter" Activated Blank Out Sign will be required for eastbound E St traffic.

The above-mentioned safety improvements should be considered when approval is sought for the new development. Working with Commission staff early in the conceptual design phase will help improve the safety to motorists and pedestrians in the County.

If you have any questions in this matter, please call me at (415) 703-2795.

Very truly yours,



Kevin Boles  
Environmental Specialist  
Rail Crossings Engineering Section  
Consumer Protection and Safety Division

cc: Gene Shepard, California Northern Railroad

**Exhibit K to April 5, 2010  
Verified Statement of Thomas Sheaff**

January 7, 2008

Joe and Larry Alamillo  
Alamillo Steel  
1101 Nimitz Avenue  
Vallejo, Ca 94592

A logo consisting of a square containing the letter 'C' followed by the word 'COPY' in a bold, sans-serif font.



Re: Rail Service

Dear Joe and Larry:

This will serve as official notice that Lennar Mare Island is abandoning its efforts to provide rail service on Mare Island.

On November 12, 2007, we sent a letter to California Northern advising them of this impending decision and again expressing our willingness to transfer the ownership and responsibility for the rail lines to their operation. In the past, California Northern has advised that the costs of upgrading, replacement, and maintenance of this line are prohibitive to California Northern taking ownership.

Section 5.9 of the 2005 Amended and Restated Specific Plan anticipated a "...joint funding mechanism for necessary upgrades and maintenance..." and stated the funding would be determined as part of ongoing negotiations between the Master Developer, the users of the freight rail service, the City of Vallejo, and the railroad service provider. Over the past several years, LMI has made a number of attempts to resolve the cost and risk involved with keeping this service in operation to preserve the historic characteristic and provide an amenity for the heavy industrial users on Mare Island. On numerous occasions we have engaged both California Northern Railway and the City of Vallejo in conversations to determine how the issues could be resolved with no success. In 2005/2006 we worked diligently toward entering into an Operating Agreement with California Northern and offered to discuss LMI's future involvement in permanent system improvements, mostly rail crossings, as we built new streets. These efforts failed primarily because California Northern was unwilling to assume any liability resulting from operating their rail cars on Mare Island and no feasible funding source could be determined.

We have continued to allow California Northern to operate on Mare Island without the benefit of an Operating Agreement and at great risk to our company. This was done to provide continuous service to you while we tried to find a solution.

**LENNAR MARE ISLAND**

A JOINT VENTURE OF LNR PROPERTY CORPORATION & LENNAR COMMUNITIES  
690 Walnut Avenue, Suite 100 Vallejo, California 94592  
707.562.4000 tel 707.562.4002 fax

Joe and Larry Alamillo  
Alamillo Steel  
January 7, 2008

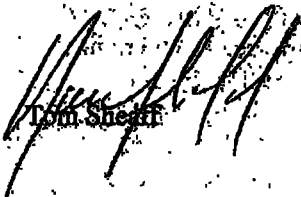
Page Two

Our inability to find a solution to the liabilities associated with allowing the rail to continue in operation and the unwillingness of California Northern and/or the City of Vallejo to share in the risks and the cost to bring this service to CPUC standards leaves Lennar Mare Island, LLC with no choice but to discontinue allowing the service.


We are notifying California Northern to discontinue using the rail effective March 31, 2008. We are very sorry for any inconvenience that this may cause to you and your operation and would be happy to discuss our decision with you at your convenience.

Sincerely,

LENNAR MARE ISLAND, LLC



Tom Sheaff



Wanda Chihak

LENNAR MARE ISLAND



**Exhibit L to April 5, 2010  
Verified Statement of Thomas Sheaff**



## CALIFORNIA NORTHERN RAILROAD CO.

129 Klamath Court • American Canyon, CA • 94503 • Phone: 707.557.2868 • Fax: 707.557.2941

February 6, 2008

Mr. Tom Sheaff  
Ms. Wanda J. Chihak  
Lennar Mare Island  
690 Walnut Avenue, Suite 100  
Vallejo, CA 94592

(via email only)

**Re: Railroad service on Mare Island**

Dear Mr. Sheaff and Ms. Chihak:

CFNR Operating Company ("CFNR") has been operating over the railroad tracks on Mare Island that are owned by Lennar Mare Island ("LMI"). Recent operations have continued without a contract with LMI.

The line on Mare Island had been used to serve the military base prior to the base closing. As we understand the operation at that time, the track within the base was not served by a common carrier railroad. The Union Pacific Railroad Company ("UP") would deliver cars to the entry to the base and pick up cars from the base. Service within the base was performed solely for the base.

CFNR was hired by LMI to operate the railroad track within the former military base once it was acquired by LMI. CFNR did not change the scope of the operations. CFNR has acted as a switching carrier between the UP and the shippers and receivers on Mare Island. CFNR is not an interline settlement carrier. CFNR is paid a switching fee by UP regardless of the rate charged for the commodity and distance of the transportation. CFNR does not share in the line haul rate. As such, CFNR has not held itself out to be a common carrier for service on Mare Island. CFNR today only receives a switch fee for the service it performs on Mare Island. The UP has provided the car supply to the shippers, has quoted rates, and has generated bills of lading and waybills.

## CALIFORNIA NORTHERN RAILROAD CO.

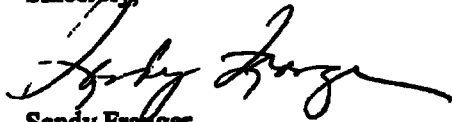
129 Klamath Court • American Canyon, CA • 94503 • Phone: 707.557.2868 • Fax: 707.557.2941

Page 2

Since the CFNR operations on Mare Island are not common carrier operations, it is CFNR's belief that it does not require authority from the Surface Transportation Board to terminate those operations. Therefore, in accordance with the notice from LMI, CFNR will cease operations in time for all cars on Mare Island to be removed by March 31, 2008.

If you have any questions, please contact me at 561-226-1722.

Sincerely,



Sandy Franger

VP- Contracts & Intercarrier Agreements

Copy to: Warren Wilson and John Miller, Union Pacific Railroad (email only)  
Bob Jones, Don Seil, CFNR (email only)  
Paul Lundberg , Scott Williams, RailAmerica (email only)



A RailAmerica Company



**Finance Docket No. 35360**

**Verified Statement of George Young**

**Exhibit 2**

## **VERIFIED STATEMENT**

**OF**

**GEORGE YOUNG**

1. My name is George Young. I am a retired former civilian employee of the U.S. Navy. I currently live in Vallejo, California. From 1969 until 2003, I worked at the Mare Island Shipyard, where I had various responsibilities relating to the maintenance and oversight of the rail trackage system on the former Mare Island Naval Shipyard.

2. In connection with my job at the Mare Island Shipyard, I became familiar with railroad operations on the Shipyard from the 1970s, when the Navy operated its own locomotives, through the mid-1990s. Just prior to closure of the Mare Island Shipyard (April 1996), the Navy allowed California Northern to switch cars on Mare Island.

3. During the entire time the Mare Island Shipyard was operational (up to the time that California Northern began switching), the only rail operations that were carried out were by U.S. Government civilian employees operating locomotives owned by the Navy. Navy locomotives would pick up cars delivered by Southern Pacific at Folsom Acres, and bring them onto the Island. Operations on the Island, using Navy locomotives, were entirely to serve Navy operational needs. The principal operations during this time period involved the movement of materials to and from Navy nuclear submarines undergoing refueling or decommissioning at two of the navy drydocks at the shipyard. Carrying out those operations required upgrading selected tracks to what we called "special purpose" standards so that cars carrying nuclear materials could be switched safely to the drydock locations. However, most of the track on Mare Island was

not needed for these operations and was not upgraded. Other materials were moved by rail on the Island, primarily to heavy industrial manufacturing buildings, but much of the historic trackage on the Island was not used at all, or was used only very rarely, during the time I was at Mare Island.

4. In the mid-1990s, when the Shipyard's activities had wound down, the Navy railroad ceased operating, and the trackage on Mare Island was idle. At some point, the Navy leased a building to California Northern for that railroad to use for locomotive repair and maintenance. That building was located south of A Street, near Azuar Drive. Neither the track nor the facility exists today. Initially, California Northern had no rights to use trackage on Mare Island for any other purpose. Subsequently, the Navy allowed California Northern to begin switching a small number of cars to other businesses that had leased former-Navy buildings.

5. I recall only two such businesses to which California Northern delivered railcars. One was XKT. California Northern brought cars for XKT across the Causeway, moved them down the trackage in Railroad Avenue, and delivered them on the trackage in railroad Avenue where XKT's facility is located today.

6. The other was North Pacific Lumber. California Northern brought cars for North Pacific across the Causeway and delivered them for unloading by North Pacific on Railroad Avenue near A Street.

7. The rail trackage on the Shipyard was not installed with the idea that the streets of Mare Island would be public streets, or that civilian vehicle and pedestrian traffic would co-exist with rail operations. We installed track wherever the Navy's operations required it. Much of that track ran in the streets, but none was signaled with

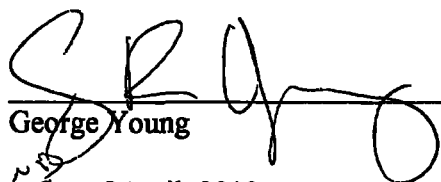
crossing arms or another warning devices. When the Navy Railroad operated on this trackage crews would stop at each block and provide flag protection, and movements carrying nuclear materials would receive a military police escort. When California Northern operated on Mare Island in the 1990s, it did not want to take these same precautions, which I understand was one of the reasons the Navy did not extend California Northern's license to operate.

**VERIFICATION**

State of California       )  
                                      )  
                                      )  
                                      )  
County of Solano         )  
                                      )

SS

George Young, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted therein are true and that the same are true as stated.

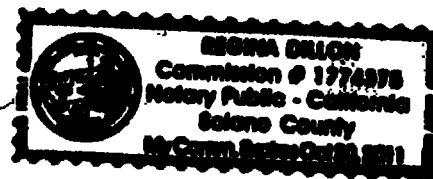
  
George Young

Subscribed and sworn to before me this 2<sup>nd</sup> day of April, 2010.

  
Notary Public

Notary Public of Solano County.

My Commission expires: Oct 20, 2011.



**Finance Docket No. 35360**

**March 19, 2010 Petition to Revoke Exemption**

**Exhibit 3**

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW  
WASHINGTON, D.C.  
20006-1888

TELEPHONE: 202.887.1500  
FACSIMILE: 202.887.0763

WWW.MOFO.COM

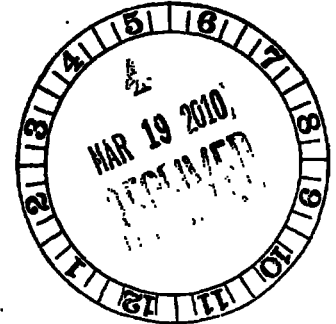
MORRISON & FOERSTER LLP

NEW YORK, SAN FRANCISCO,  
LOS ANGELES, PALO ALTO,  
SAN DIEGO, WASHINGTON, D.C.

NORTHERN VIRGINIA, DENVER,  
SACRAMENTO, WALNUT CREEK

TOKYO, LONDON, BRUSSELS,  
BEIJING, SHANGHAI, HONG KONG

March 19, 2010



**BY HAND DELIVERY**

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C: 20024

Re: Finance Docket No. 35304: *San Francisco Bay Railroad-Mare Island – Notice of Exemption – California Northern Railroad*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket are an original and ten copies of the Petition to Revoke Exemption on behalf of Lennar Mare Island LLC, along with a check payable to the Surface Transportation Board for the filing fee of \$250, in accordance with 49 C.F.R. § 1002.2(f)(61).

Please date stamp the extra copy of this filing and return it with our waiting messenger.

Respectfully,

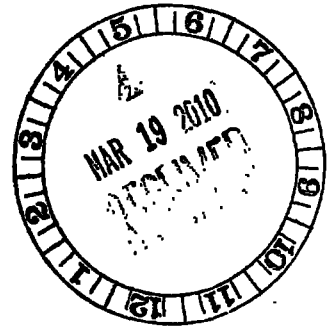
Karen E. Escalante

Enclosures

cc (with enclosures): John F. McHugh, Esq.  
Thomas Sheaff, Esq.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 35304**



**SAN FRANCISCO BAY RAILROAD-MARE ISLAND -  
OPERATION EXEMPTION - CALIFORNIA NORTHERN RAILROAD**

**PETITION TO REVOKE EXEMPTION**

David L. Meyer  
Karen E. Escalante  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
202.887.1519  
dmeyer@mofo.com

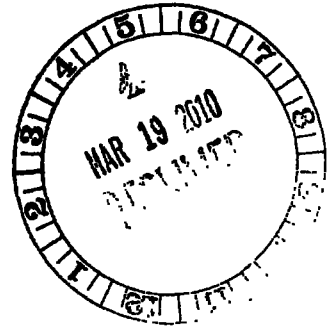
*Attorneys for Lennar Mare Island, LLC*

**March 19, 2010**



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 35304**



**SAN FRANCISCO BAY RAILROAD-MARE ISLAND -  
OPERATION EXEMPTION - CALIFORNIA NORTHERN RAILROAD**

**PETITION TO REVOKE EXEMPTION**

Pursuant to 49 U.S.C. § 10502(d), Lennar Mare Island, LLC ("LMI") petitions to revoke the exemption issued to San Francisco Bay Railroad-Mare Island ("SFBR") in Finance Docket No. 35304 to the extent that exemption applies to trackage located on Mare Island and owned by LMI. SFBR's Verified Notice of Exemption ("Notice") contained false and misleading information relating to the ownership of that trackage and SFBR's rights thereto, and the exemption accordingly should be revoked as void *ab initio*.<sup>1</sup>

SFBR's Notice purported to seek operating authority over eight miles of railroad trackage in and near Vallejo, California, running from a connection with the California

<sup>1</sup> LMI is seeking revocation at this time because, as discussed below (p. 10), for some time it was engaged in discussions with SFBR regarding its intentions with respect to the proposed operation of LMI-owned trackage, with the aim of determining whether a mutually-acceptable arrangement could be worked out to allow SFBR access to LMI's property. LMI subsequently refrained from filing to allow an informal Board-sponsored dispute resolution process to proceed. That process ended on March 15, when SFBR filed its Petition in Finance Docket No. 35360.

Northern Railroad at Flosden Acres, across the Mare Island Strait via the Mare Island Causeway, and terminating on "branches on Mare Island." A map depicting this line, based on that provided with SFBRR's Notice, is Exhibit A hereto.<sup>2</sup> Contrary to the representations contained in SFBRR's Notice, the portion of this trackage located on Mare Island is owned by LMI, not by the City of Vallejo. With the sole exception of a short spur adjacent to the Causeway serving a single customer,<sup>3</sup> SFBRR has no contractual or other rights to operate over that trackage, and there is no prospect of SFBRR obtaining any such rights.<sup>4</sup> Accordingly, the Surface Transportation Board should revoke the exemption with respect to that trackage. LMI does not seek any action -- and takes no position at this time -- with respect to the exemption as it relates to trackage between Flosden Acres and the Mare Island Causeway, which is owned by the City of Vallejo. See Exh. A.

## **BACKGROUND**

### **Redevelopment of Mare Island Navy Shipyard**

LMI is a real estate development company that owns and is in the process of redeveloping a significant portion of the property formerly occupied by the U.S. Navy's Mare Island Shipyard, including the rail trackage on Mare Island purportedly covered by

---

<sup>2</sup> SFBRR's map did not identify LMI as the owner of the trackage on Mare Island.

<sup>3</sup> Alstom, one of LMI's tenants, has a non-exclusive leasehold interest in the 300-yard spur that connects its plant with the Mare Island Causeway (as shown on Exhibit A). Those rights allow Alstom to arrange private switching service using the spur with SFBRR or any other contract provider of its choosing, so long as Alstom complies with the terms of its lease from LMI. LMI understands that SFBRR has recently switched some railcars on this spur.

<sup>4</sup> The factual assertions contained herein are verified by Thomas Sheaff of LMI. Mr. Sheaff's Verified Statement is Exhibit B hereto.

SFBRR Notice. For more than 150 years, the Mare Island Naval Shipyard, a major U.S. Navy installation, occupied all of Mare Island. The Shipyard was placed on the official base closure list in 1993 and was officially closed in 1996. The U.S. Government entered agreements providing for the conveyance of portions of the real property underlying the former Shipyard to the City of Vallejo for conversion to civilian use. The City contemplated that the former base would be comprehensively redeveloped into an extensive and vibrant mixed-use civilian community. To carry out this vision, the City conducted an extensive public selection process and appointed LMI as the master developer in 1997. In this role, LMI commenced a multi-year year process that is still underway and has included the settlement of numerous jurisdictional issues, coordination of entitlements between many public and private agencies, development in conjunction with the City of a comprehensive plan for redevelopment (primarily referred to as the "Specific Plan"), preparation of a full Environmental Impact Report, oversight of one of the most complex environmental clean up projects in California, and coordination of all types of land uses where no such planning and coordination had previously existed.

The first 653 acres of the Mare Island site were conveyed to LMI in 2002. As part of carrying out LMI's redevelopment of this property, LMI entered into an innovative "early transfer agreement" with the U.S. Navy that transfers certain environmental responsibility to LMI and thereby allows development to be accelerated.

Certain environmental cleanup responsibilities, both within and outside LMI's 653 acres, were retained by the U.S. Navy, and the Navy's remediation efforts are ongoing, including work that has necessitated the removal of certain rail trackage by the Navy's contractor to allow it to address contamination of underlying soil.

The redevelopment plan contemplates that the former-Shipyard will have 1,400 private residences and over seven million square feet of space devoted to industrial, manufacturing, office, civic, retail, restaurant, and entertainment uses. Redevelopment will also include creation of an extensive park, pedestrian and bicycle system throughout the Island that links all land uses. A majority of the 403 historic structures and other resources at the former-Shipyard will be retained and reused.

Substantial redevelopment work has already been carried out. LMI has already invested over \$140 million in the redevelopment of Mare Island, mostly on infrastructure to serve both LMI and adjacent property. There are approximately 90 businesses, and in excess of three million square feet occupied, all resulting in more than 1,865 new permanent jobs. Residential land sales to third parties have led to 272 residential units. Several commercial properties have been sold. Mare Island has a public elementary school, a private university, and a museum. Approximately 50 percent of LMI's property has been certified as clean by the environmental regulators, and over 45 historic former U.S. Navy buildings have been put back into use.

However, the development project is very much a work in progress. Extensive work remains, including a significant amount of work to address additional environmental remediation and infrastructure improvements to deal with conditions inherited from the years when this property was a working Navy installation. LMI continues to design infrastructure and continues to meet its obligations to rehabilitate streets, wet and dry utilities, railroad trackage and other infrastructure to make them safe and compatible with the radically-transformed public land use needs of Mare Island. As a military facility, of course, Mare Island was not accessible to the public; was not built

in conformance with any minimum standards or specifications that would normally be applied by public agencies, and, as a result its infrastructure was not designed with public use and civilian safety as a principal consideration. Allowing public access to new local parks, the new waterfront promenade, new regional parks and wetlands on the Island, the new pedestrian and bike paths, and the new public ferry terminal, all in the context of a site that in large part was previously devoted to heavy military industrial use, are just a few of the many complex issues that LMI and the City of Vallejo are working to address. LMI is working closely with the City to identify safe and cost-effective solutions.

#### **Railroad Trackage at Mare Island**

When Mare Island was a military installation, the U.S. Navy installed and operated several miles of railroad trackage that it used to carry out its own military functions. For example, trackage connected ammunition storage facilities on the Island with docks used to load munitions on warships, and equipment was delivered by rail from the mainland to the warehouse, manufacturing and drydock facilities used by the Navy to build and maintain warships. Befitting the Shipyard's status as a major industrial site, and because public access and safety were not paramount issues at the time, much of the trackage, particularly in the eastern portion of the Island, was laid directly in the Shipyard's streets, roadways and parking lots, rather than occupying its own right of way.

When the Navy closed the Mare Island Shipyard in the mid-1990s, it also shut down its own rail operations. Much of the former Navy trackage remained in place, however. LMI and the City of Vallejo believe that some portions of that trackage could play a productive role in the redevelopment of Mare Island, so long as any use of that

trackage could be carried out in a manner compatible with the ongoing mixed-use redevelopment of Mare Island as a whole.

After the Navy's own rail operations ceased, the first rail operations on the line that were conducted by an entity other than the Navy were those of California Northern Railroad, pursuant to a short-term license granted by the U.S. Navy to California Northern, and for which no Board authority was sought. In 1993, California Northern had leased Southern Pacific's Vallejo Branch (now owned by Union Pacific), which runs from Napa Junction to the City of Vallejo and connected with the Navy railroad at Flosden Acres. The Navy license allowed California Northern to provide switching services at certain Shipyard facilities and to operate on Navy trackage to a connection with California Northern's own leased trackage at Flosden Acres, where the Navy previously had exchanged cars with that carrier.

California Northern's operations on Mare Island ceased in early 2008, after the volume of cars switched declined precipitously – as a result, *inter alia*, of a devastating fire at one business on Mare Island and the relocation of another to a location off of the Island where it could obtain longer-term access to facilities – leading LMI and California Northern to conclude that rail service would no longer support the infrastructure work needed to make rail service compatible with the Island's redevelopment.

California Northern did not seek Board authority when it ceased operating on Mare Island. At no time did California Northern hold itself out as a common carrier, or obtain any Board authority to operate on Mare Island.

The City and LMI have recently had discussions to address the future of the rail service on Mare Island. LMI has taken steps to allow limited rail service to its tenants

and other businesses reached via LMI property, subject to the overriding need for any use of the rail trackage that LMI now owns be carried out solely in furtherance of LMI's interest as the owner and developer of Mare Island in accordance with the City approved Specific Plan. As discussed below, after discussions with SFBRR aimed at determining whether an acceptable arrangement could be worked out to provide SFBRR with access to LMI-owned trackage on Mare Island, LMI concluded that no such agreement was possible.

After unsuccessful attempts to reach agreement with SFBRR, LMI decided to carry out its aim of making rail service an option for LMI's tenants and other businesses on Mare Island, by arranging for a private rail operator – T&O Railroad Company, Inc. ("T&O"), doing business as Mare Island Rail Service ("MIRS") – to perform switching services on Mare Island. T&O is an affiliate of Tri-City Railroad Company, LLC, an experienced rail carrier licensed by the Board with operations in the State of Washington. Pursuant to the agreement between LMI and T&O, MIRS will provide private switching services throughout Mare Island. MIRS will move railcars to and from former-U.S. Navy sidings and spurs on Mare Island as appropriate to allow for loading and unloading of railcars at locations where LMI has leased or conveyed facilities to businesses that LMI concludes would benefit from rail service, and where such service would not impinge on the broader redevelopment interests shared by LMI and the City.

**SFBRR's Notice of Exemption**

SFBRR is a stranger to Mare Island, having no connection to the Island and no interest (contractual or otherwise) in the railroad trackage on Mare Island. SFBRR's Notice of Exemption – which appeared to ignore LMI's ownership interest in the

trackage on Mare Island and assert a right to operate as a common carrier serving that trackage – came as a surprise to LMI. Despite contact with LMI before SFBRR filed its Notice, SFBRR did not inform LMI that it intended to seek Board authority to operate over LMI property on Mare Island prior to filing that Notice.

Despite SFBRR's unilateral action, LMI opened a dialog with SFBRR about SFBRR's intentions with respect to the Mare Island trackage, and the terms on which LMI might be prepared to allow it to use LMI-owned trackage to provide private rail service on the Island. Although SFBRR initially claimed that it did not need LMI's permission to operate over the track on Mare Island, SFBRR later acknowledged that it did not have any contractual right to use LMI's trackage. In November 2009, LMI informed SFBRR that, without regard to the outcome of ongoing discussions between LMI and SFBRR about broader rights to operate on Mare Island, SFBRR could operate on the Alstom spur (the first 300 yards on the Mare Island side of the Causeway) to serve Alstom, per the terms of Alstom's lease. The only operations SFBRR has conducted on Mare Island have involved the delivery of cars to Alstom.

Based on LMI's discussions with SFBRR about a potential arrangement for SFBRR to operate on Mare Island, LMI reached the conclusion that SFBRR's objectives are incompatible with LMI's property interests and redevelopment obligations, and that no agreement with SFBRR is possible. Although SFBRR has absolutely no contractual or other rights to use LMI's property, it nevertheless asserts that LMI is obligated to grant it virtually unrestricted access to LMI's trackage – including the right to operate anywhere at any time hauling any commodity it wishes – based solely on SFBRR's claim



that its Notice of Exemption purports to appoint it the "common carrier" operator of trackage on Mare Island.

Nevertheless, LMI was willing to forebear from filing its Petition to revoke so as to permit the Board's Rail Customer & Public Assistance Program to undertake an informal dispute resolution process aimed at determining whether the differences between LMI and SFBRR could be bridged. That process ended when SFBRR decided to file its Petition for Declaratory Order and for an Emergency Service Order in Finance Docket No. 35360.

### ARGUMENT

As stated in the Board's Notice in this matter, exemptions under 49 U.S.C. § 10502 are void *ab initio* when the verified notice contains false and misleading information. Here, SFBRR's verified notice was false and misleading in at least two interrelated respects.

*First*, SFBRR misrepresented that it did not need to obtain from LMI any contractual rights to operate over trackage located on Mare Island. SFBRR instead falsely represented (at 2, § "c") that the City of Vallejo "owns the real estate occupied by the line of railroad," and that SFBRR was "currently negotiating an operating agreement with the City." *San Francisco Bay Railroad – Mare Island – Operation Exemption – California Northern Railroad*, STB Finance Docket No. 35304 (served Sept. 28, 2009). This statement falsely implied that all of the trackage subject to SFBRR's notice was owned by the City of Vallejo and that SFBRR therefore *did not need* to reach agreement with LMI.

*Second*, SFBRR's verified notice also stated (at 2, § "d") that SFBRR proposed to operate over "lines owned by the City of Vallejo, California *and/or Lennar Mare Island, LLC.*" *Id.* (emphasis added). Read in conjunction with SFBRR's representations about its negotiation of an operating agreement with the City of Vallejo, this statement plainly (and falsely) suggested that, to the extent LMI did own any of the trackage, SFBRR already had whatever contractual rights it needed to conduct operations on LMI's property.

Whether interpreted as representing that the Mare Island trackage was owned by the City instead of by LMI, or as representing that SFBRR already had rights to operate over trackage owned by LMI, SFBRR's verified notice was false and misleading. In fact, there can be no dispute that LMI owns all of the trackage on Mare Island, and that (other than the Alstom spur, as to which Alstom could arrange its own private rail service) SFBRR has no right whatsoever to use that trackage without LMI's agreement.<sup>5</sup> Despite being aware of these facts, as of September 28, 2009 – the date of SFBRR's verified notice – SFBRR had made no effort whatsoever to obtain any such rights from LMI.

The Board has held that false and misleading statements about the ownership status of a rail line warrant revocation of an exemption as void *ab initio*. For example, in *US Rail Corp. – Lease & Operation Exemption – Shannon G., a New Jersey Limited Liability Company*, STB Finance Docket No. 35042 (served Oct. 8, 2008), the Board revoked the exemption where the verified notice failed to mention a pending condemnation action that was aimed at ending Shannon G.'s ownership of the very parcel

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<sup>5</sup> SFBRR's recent Petition in Finance Docket No. 35360 seeking an emergency service order from the Board granting access to LMI's property at terms fixed by the Board, confirms that SFBRR understands that it has no rights to use LMI's trackage.

on which it proposed to conduct rail operations. *See also, e.g., Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western R.R. – Modified Rail Certificate*, STB Finance Docket No. 34924 (served Jan. 27, 2010), p. 4 (“Failure to disclose potential issues regarding ownership of the issue line in a notice could be found to be materially misleading by omission.”). SFBRR’s misrepresentations are no less fundamental, as they assert rights to conduct operations on LMI’s property that simply do not exist.<sup>6</sup>

In this case, there are particularly compelling policy reasons for revoking SFBRR’s exemption with respect to the LMI-owned trackage on Mare Island. In discussions with LMI and others SFBRR has claimed that its exemption provides it with the “obligation” to serve potential rail customers on Mare Island as a railroad that has been granted common carrier regulatory authority. Such statements, of course, ignore that whatever authority might be granted by a Board exemption (even if not void *ab initio*) would be at most “permissive,” and would not provide any contractual rights to carry out the exempted operations. *See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, STB Finance Docket No. 33905 (served Oct. 22, 2001) (“The question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether that

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<sup>6</sup> This case is unlike those where the Board has found that an entity’s lack of contractual rights to operate a line it was seeking authority to operate did not warrant revocation of the exemption. *See, e.g., The Chicago, Lake Shore & South Bend Ry. – Acquisition & Operation Exemption – Norfolk Southern Ry.*, STB Finance Docket No. 34960 (served Feb. 14, 2008), p. 3. In such cases, the noncarriers were merely “overly optimistic” about the prospects for an agreement, but did not affirmatively misrepresent the identity of the line’s owner or the noncarrier’s lack of any need for them to obtain contractual rights.

party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority.”); *James Riffin – Petition For Declaratory Order*, STB Finance Docket No. 35245 (served Sept. 15, 2009) (“Riffin claims that whether legal title has passed is irrelevant because he has Board authority to operate the line. But that authorization is permissive, not mandatory, and did not give him a legal property interest in the line. Riffin would have to acquire some suitable legal interest that would give him the ability to exercise his authority and hold himself out as a common carrier before he could qualify as a rail carrier.”).

Here, there is no dispute that SFBRR lacks any such “property interest or contractual right,” and LMI as the owner of the trackage has determined that SFBRR will not be permitted to conduct any such operations. As noted above, LMI has instead contracted with Mare Island Rail Service to perform private switching operations on Mare Island. Against this backdrop, the exemption should be revoked so that SFBRR may no longer point to its falsely-obtained exemption as providing it with a mantle of “regulatory authority” to operate on Mare Island.<sup>7</sup>

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<sup>7</sup> Revocation would also be warranted under the standards of 49 U.S.C. § 10502(d), on the ground that SFBRR’s proposed common carrier operations – if they could be successfully implemented – “would convert private carrier operations into for-hire common carrier service. Such a conversion triggers this agency’s primary jurisdiction, thus withdrawing the service and the property over which it operates from many aspects of local control.” *Riverview Trenton R.R. – Acquisition & Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (served Feb. 15, 2002). As in *Riverview Trenton*, SFBRR’s proposed operations would usurp “local control over the property involved,” and thereby interfere with LMI’s ongoing redevelopment of Mare Island. LMI submits that SFBRR is misusing Board processes in order to try to impose itself into the middle of a locally controlled redevelopment and transformation of Mare Island from a military base into a vibrant mixed-use community. Interposing common carrier obligations and the sweeping preemption that accompanies Board jurisdiction would improperly interfere with that transformation in fundamental ways. These issues

(footnote continued on next page ...)

## CONCLUSION

For the foregoing reasons, the Board should revoke SFBRR's exemption.

Respectfully submitted,



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*Attorneys for Lennar Mare Island, LLC*

March 19, 2010

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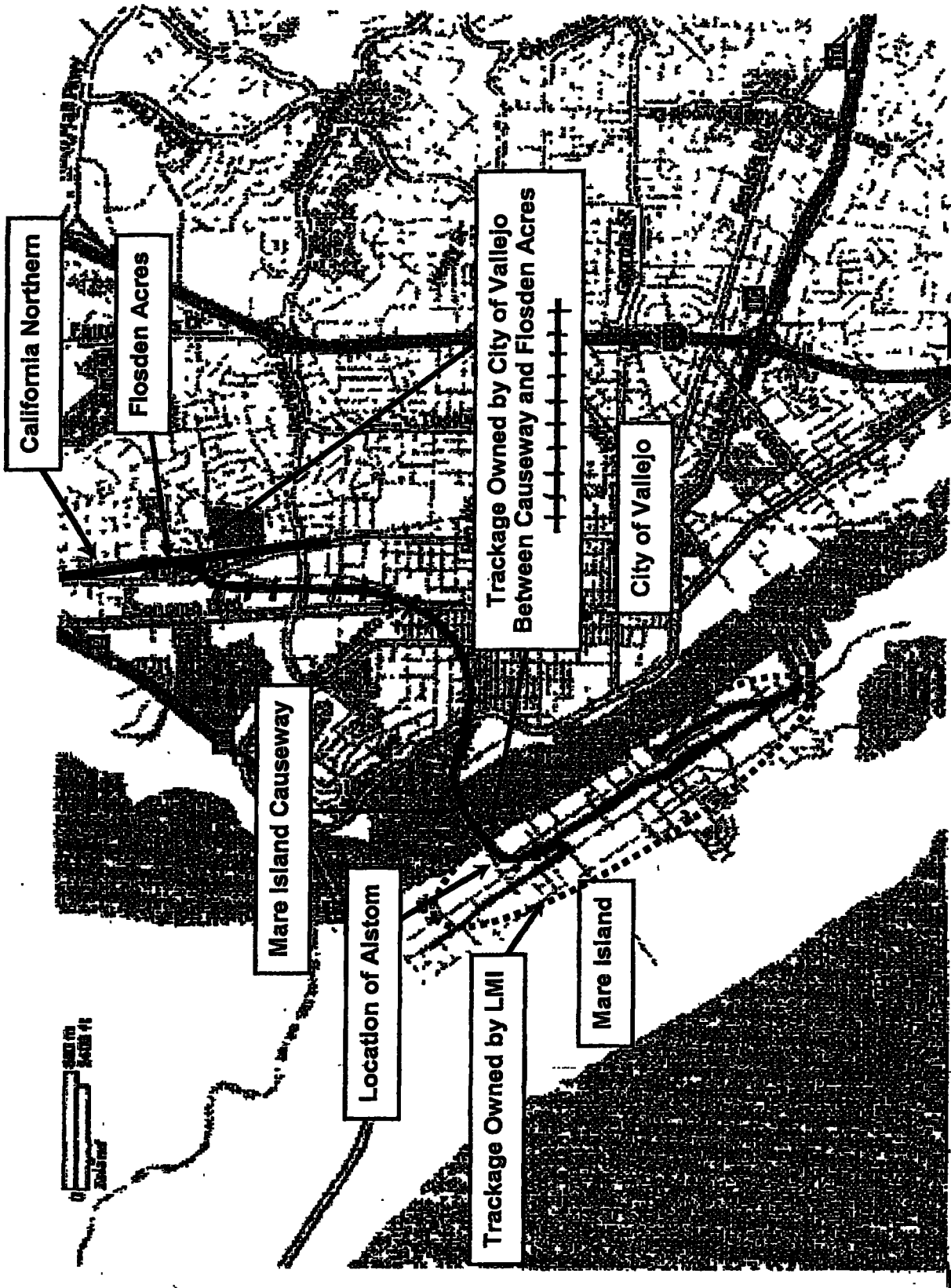
(... footnote continued from previous page)

will be litigated more fully in the related declaratory order proceeding commenced by SFBRR in Finance Docket No. 35360. If the Board is disinclined to revoke SFBRR's exemption as void *ab initio*, LMI requests that it consolidate this Petition with that proceeding so that the question of SFBRR's regulatory authority can be considered in conjunction with the question of its common carrier obligations with respect to Mare Island trackage.

**Finance Docket No. 35304**

**Annotated Version of Map Accompanying  
SFBRR Notice of Exemption**

**Exhibit A**



**EXHIBIT A**  
**ANNOTATED VERSION OF MAP ACCOMPANYING SFBRR NOTICE OF EXEMPTION**

**Finance Docket No. 35304**

**Verified Statement of Thomas Sheaff**

**Exhibit B**



**EXHIBIT B**  
**VERIFIED STATEMENT**  
**OF**  
**THOMAS SHEAFF**

1. My name is Thomas Sheaff. Since 1998, I have served in various capacities for Lennar Mare Island, LLC ("LMI"). Currently, I am a Vice President, and an officer of, Lennar Homes of California, the sole member of LMI.

2. I have been responsible for LMI's implementation of its Mare Island redevelopment project. I am familiar with LMI's acquisition of Mare Island from the City of Vallejo, the redevelopment objectives of the City and LMI, LMI's plans for carrying out those objectives, and all of the issues associated with the former U.S. Navy rail trackage located on Mare Island and owned by LMI.

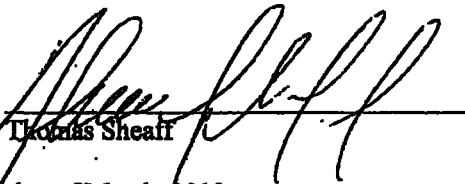
3. I have also been personally involved in discussions with San Francisco Bay Railroad-Mare Island regarding its proposed operations on LMI-owned trackage and LMI's arrangements on Mare Island rail service.

4. I am submitting this statement in connection with LMI's Petition to Revoke Exemption and have reviewed the accompanying Petition. All of the factual statements therein are within my personal knowledge and are true and correct as stated.


VERIFICATION

State of California     )  
                                  )  
                                  )     SS  
                                  )  
County of Solano        )

Thomas Sheaff, being duly sworn, deposes and says that he has read the foregoing statement and Petition to Revoke Exemption, knows the facts asserted therein are true and that the same are true as stated.

  
Thomas Sheaff

Subscribed and sworn to before me this 19 th day of March, 2010.

  
Notary Public

Notary Public of California.

My Commission expires: July 19 2010



# **CERTIFICATE OF SERVICE**

I, Karen E. Escalante, certify that on this date a copy of Lennar Mare Island LLC's Petition to Revoke Exemption, filed on March 19, 2010, was served by email and by first-class U.S. mail, postage prepaid, on all parties of record, specifically:

John F. McHugh  
6 Water Street  
Suite 401  
New York, NY 10004  
Email: JFMcHughPC@AOL.com

  
\_\_\_\_\_  
Karen E. Escalante

Dated: March 19, 2010

**Finance Docket No. 35360**

**April 3, 2010 Vallejo Times Herald article**

**Exhibit 4**

# Times-Herald

## Mare Island eager for railroad's full return

By Jessica A. York / Times-Herald

Posted 04/03/2010 01:01:15 AM PDT



Most of Mare Island's extensive network of railroad tracks is unused. (Times Herald file photo)

After nine decades connecting Mare Island to Vallejo and beyond, rail service on the island ceased in March 2008, leaving a handful of island industrial companies without affordable transport.

Now, rail service has returned to the island, but only to transportation company Alstom, the first business on the rail line, where it crosses over the Wichels Causeway. That's left other Mare Island industrial businesses saying "What about me?"

XKT Engineering, which has been leasing Mare Island space since 1995, is one of the companies waiting for the railroad's return, General Manager Gary Mathison said.

Rail service once delivered steel plate material directly to the company's doorstep. Now it's delivered by rail to American Canyon, then transferred to wide-load trucks for the last leg of the trip, Mathison said. In addition to extra costs for the transfer, the company needs to acquire wide load permits from both American Canyon and Vallejo, he said.

"One thing for us, (is) when we're buying materials and bringing plate in, one of our biggest problems is bidding a project two years down the line," Mathison said. That's because his company doesn't know if it will have access in the future to rail service, which is cheaper.

"Any advantage that we can keep, of course it's going to help. Rail's a big issue for us," he said.

Before rail service can be fully re-established, a federal railroad transit board must rule on a dispute about who has the rights to the rail line.

Vallejo-hired real estate developer Lennar Mare Island, which owns much of the land the island rail runs over, has hired an on-island rail switching service, Mare Island Rail Service. At the same time, a San Francisco-based rail company says it has an obligation to return unfettered service to Mare Island.

The outside railroad company -- San Francisco Bay Railroad -- agreed to begin serving Alstom late last year with plans to expand the service to the whole island, company owner David Gavrich said.

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# Times-Herald

"We're hoping for a positive outcome to bring rail back to Mare Island," Mathison said of the dispute, adding that his company may purchase its property once it has been environmentally cleaned. "We don't care who's going to do it, we just want to see it shake out and rail service return to us."

San Francisco Bay Railroad has taken its desire to expand service to the federal Surface Transportation Board for a ruling. Included in the company's plea are letters from XKT, Alco Iron & Metal Co., Earthquake Protection Systems Inc., Alamillo Rebar Inc. and even Alstom, asking for long-term island-wide rail service.

At the time rail shut down, Lennar Mare Island spokesman Jason Keadjian told the Times-Herald that the developer could not afford the \$11 million worth of track improvements needed to keep the rail running. Needed improvements at the time included installation of 15 railroad crossings and street widening to accommodate rail lines in the middle of the road.

The city of Vallejo, too, is vying for the return of rail service to all of Mare Island, in accordance with various development plans for the area, Assistant City Manager/Community Development Director Craig Whittom said.

"The city ... has a strong interest in rail service on Mare Island," Whittom said. "In the Specific Plan, that's been consistent with the vision for Mare Island."

City management extended a short-term lease with San Francisco Bay Railroad for the tracks it owns this month by six months, rather than a planned long-term lease, Whittom said. The city is waiting for the Surface Transportation Board ruling.

Contact staff writer Jessica A. York at [jjork@timesheraldonline.com](mailto:jjork@timesheraldonline.com) or (707) 553-6834.

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